United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4179

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FOR THE SECOND CIRCUIT

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

THE FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDER
OF THE FEDERAL TRADE COMMISSION

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BRIEF FOR PETITIONER THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

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BRIEF FOR PETITIONER THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

This brief is submitted on behalf of The Great Atlantic & Pacific Tea Company, Inc. ("A&P") in support of its petition for review of a final order of the Federal Trade Commission ("Commission" or "FTC") dated April 29, 1976, holding A&P in violation of Section 2(f) of the Clayton Act, as amended, 15 U.S.C. § 13(f) (1970), or "the Robinson-Patman Act".

The opinion of the Commission (A1021, *et seq.*)[1] supporting its Final Order (A1017, *et seq.*) is reported unofficially

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[1] "A" refers to pages in the Appendix, "CX" to Commission exhibits, "RA&PX" to respondent A&P's exhibits, and the numbers following a witness' name are page numbers of the transcript below. Relevant statutory provisions are contained in a Statutory Appendix.

at [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,150 (FTC 1976). It was written by former Commissioner Nye, who was joined by Commissioners Dixon and Dole.[2]

Issues Presented

1. Whether the Commission erred in holding that A&P violated Section 2(f) of the Robinson-Patman Act by accepting an offer for the sale of dairy products from Borden, Inc. ("Borden") when:

(a) A&P's conduct was held unobjectionable under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (Supp. V 1975) ("FTC Act"), and Borden was not charged with or held in violation of either the FTC Act or the Robinson-Patman Act by reason of any price discrimination; and

(b) A&P was deprived of the benefit of the meeting competition defense although it had a competing offer made in good faith by the Bowman Dairy Company ("Bowman") which the Commission found was comparable and operative, and which was in fact either lower than or substantially equivalent to the Borden offer?

2. (a) Whether the Commission erred in relieving complaint counsel of the burden of proving lack of cost justification for the allegedly discriminatory prices A&P received from Borden?

(b) Whether there is substantial evidence in this record to support the Commission's finding that A&P knew or should have known that the prices it received from Borden were not cost justified?

3. Whether the Commission erroneously disregarded A&P's attempts to affirmatively show cost justification on

[2] Two vacancies existed at the time of argument.

the grounds that A&P's expert witness was "not familiar" with Borden's operations at the time in issue and did not make "contemporaneous" studies as to which all underlying business records were available at the time of trial? Whether this error was particularly egregious when the Commission itself had delayed five or six years, without explanation, between the time of the commencement of its investigation and the time its complaint was issued, and when A&P's studies were based on the best evidence then available?

4. Whether there is substantial evidence in this record that A&P knowingly induced and received from Borden prices which discriminated against other customers, to their competitive injury?

5. Whether there was substantial evidence that any such discrimination occurred "in commerce" insofar as A&P's purchases and sales of milk in Illinois are concerned?

6. Whether there was substantial evidence of price discriminations against customers which were sufficiently representative to support an order in this case?

7. Whether, in view of the staleness of the Commission's claim and the isolated nature of the alleged violation, there was sufficient basis for the order entered below in any event?

Statement of the Case

The violations alleged in the complaint center about a 1965 agreement between A&P and Borden under which Borden began supplying private label milk and other dairy products to A&P's Chicago area stores on or about November 1, 1965. Although the FTC staff investigation commenced in 1966 (A68), the complaint was not issued until

October 8, 1971. A&P received the initial decision of the administrative law judge on October 9, 1975, and the opinion of the Commission on or about May 27, 1976.

The complaint originally contained three counts. The first two charged A&P alone with a violation of Section 5 of the FTC Act in the conduct of the private label negotiations (Count I) and with inducing or receiving an unlawful price discrimination in violation of Section 2(f) as a result (Count II). Count III charged A&P and Borden with price stabilization in violation of Section 5 of the FTC Act.

The administrative law judge, Harry R. Hinkes, found against A&P on Counts I and II, but dismissed Count III. The Commission reversed Judge Hinkes on Count I and ordered the Section 5 charge dismissed; it affirmed his rulings as to Counts II and III. The instant petition for review, therefore, is limited to the Commission's finding that A&P violated Section 2(f) as alleged in Count II, the charging paragraph of which is as follows:

> "When respondent A&P knowingly induced or received the discriminatory prices from its supplier [Borden], as alleged, A&P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act." (A29)

A&P's answer denied that it had violated the Robinson-Patman Act as alleged.

Statement of Facts

In spite of the monumental record here, consisting of over 20,000 pages of testimony and exhibits compiled over 110 hearing days, the central facts are fairly simple and, as noted by the Commission, "generally not disputed"

(A1023). For the sake of brevity and clarity, we limit this Statement to those central facts, although there are other material facts referred to hereafter in discussing the points to which they are relevant.

During the time period here involved, A&P's Chicago Unit was one of 32 similar "Units", reporting to seven "Divisions", into which A&P had grouped its over 4,000 retail grocery stores (A1942-43). The Chicago Unit included over 200 stores in Northern Illinois plus about 35 in neighboring portions of Northwestern Indiana (A3337-70, 3385-406).[3]

The Key Fact Witnesses

In August of 1964, *Elmer Schmidt,* previously an assistant buyer, was designated A&P's Chicago Unit buyer. He had no prior experience in purchasing dairy products, and his new job included responsibility, in varying degrees, for the purchase of thousands of items for A&P in that area (A1838, 1873, 1875). Dairymen witnesses who had negotiated with Schmidt on behalf of Borden and Bowman agreed that he was not a knowledgeable dairy buyer (A1801-02, 2318, 6393-94).

Schmidt's immediate superior in A&P's buying chain of command was *Ira Bartels,* Director of Purchases for the Chicago Division, who in turn reported to *Herschel Smith,* A&P's National Director of Purchases in New York (A1142-43, 1837, 1937-40, 4075).

The Borden negotiating team included *Gordon Tarr* (Sales Representative for Chain Store Sales in Chicago), *Ralph Minkler* (President of Borden's Chicago Central

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[3] While there were also a few stores in Iowa, which were mentioned at an earlier stage of the private label negotiations, private label products were not in fact sold to the A&P stores in Iowa (A2177, 2225).

District), *Jack Pentz* (President of Borden's Fluid Milk and Ice Cream Division in New York), and *Harry Archer* (Borden's Executive Vice President in New York). Borden's Chicago staff also included *Joseph Malone,* who, while he did not have an accounting degree (A4090-91), did advise the Chicago Central District on costs (A1618-19).

Each of the above-mentioned witnesses testified at the hearing, except for Messrs. Pentz (who was seriously ill) and Malone (who had died). Mr. Malone's deposition was taken shortly after the complaint was issued over the objection of counsel for A&P on the ground that A&P had not had sufficient time to retain an expert cost accountant to assist in cross-examination (A37-45, 3179-80, 4287).[4]

The only truly neutral witness to the private label negotiations was *Frank T. Cannon, Sr.,* Bowman's General Manager until 1966.[5] During the period in issue, he had full responsibility for all of Bowman's sales, distribution, marketing and advertising (A2281-85). He prepared Bowman's offer to A&P with the assistance of Bowman's Senior Cost Accountant (David Parmalee) and its outside attorney (L. Edward Hart), in order to be sure that the offer was cost justified and in compliance with a 1963 Government decree against Bowman prohibiting Robinson-Patman violations (A2294-97, 2341-42, 2360-61). Cannon testified that Parmalee and Hart approved the Bowman bid and that, in submitting it to A&P, Bowman was in compliance with the Act, was not relying on any "meeting

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[4] To the extent that the opinion below relies on Mr. Malone's deposition testimony on costs to support its findings of liability, we renew that objection here.

[5] At the time he testified, Mr. Cannon was General Manager of a dairy in Canton, Ohio, where he had not done any business with A&P (A2380). Thus (unlike the other witnesses, including the former Borden executives), he had no reason to be partial to any side of this controversy.

competition" defense, and was prepared to make the same offer to others (A2311-14, 2321, 2372-73, 2385).[6]

Early Discussions

Sometime in 1964, Herschel Smith became aware that the wholesale prices A&P was paying Borden for milk in the New York area were higher than the prices at which A&P's competitors were selling milk *at retail* (A2004-05). During that year, A&P received two price reductions from Borden there (first on brand label products, then on private label) totaling $2 million annually (A2004-05, 2394).

In late 1964, Smith advised the Division Purchasing Directors (including Ira Bartels) of his "New York experience" with private label (*i.e.*, milk sold under the A&P label) supplied by Borden and asked them to look into the possibility of similar savings in their areas. Bartels relayed this to Elmer Schmidt, who asked Gordon Tarr for a private label quotation from Borden under delivery conditions which would eliminate costly in-store services to A&P at a substantial saving to Borden.[7] He specifically stated that A&P did not want an arbitrary price reduction

[6] The administrative law judge, in finding that A&P was not prejudiced by the delay in bringing this proceeding, stated in part that if they had been alive at the time of trial, "the testimony of Mr. Hart, like that of Mr. Parmalee, would have been only supplementary to that of Mr. Cannon who did testify" (A999).

[7] These Spartan conditions included store-door "drop delivery" (with no rotation of products or other in-store servicing of the dairy case), and none of the other customary services or allowances Borden had been supplying—*i.e.*, no special deliveries, no returns of product for spoilage or for any reason other than defective merchandise, preordering of products by the stores well before delivery instead of ordering from the delivery truck on its arrival, no point-of-sale merchandising materials, no demonstrators or special displays, and no reductions in price to meet competitive conditions (A2229-34, 3235, 3489-90).

but wanted Borden to figure all its costs and realize a profit on this business (A1874, 3238).[8]

While there was an earlier suggestion that A&P could obtain a discount of 1¢ a half gallon by going to private label milk, Borden admittedly "dragged its feet" and did not submit a detailed proposal until February of 1965 (A1961-62, 3216, 3232-36). At that time, it quoted private label prices on 11 of the 20-odd dairy products which it sold to A&P in the Chicago-Calumet area (A1666, 2127-28, 3236). The savings initially offered amounted to some 2½¢ on a half gallon of milk compared to Borden brand label prices to A&P under full service delivery conditions (A3236). In May and July, Borden supplemented this offer with similar prices for additional areas in Illinois and Indiana which were within A&P's Chicago Unit.

Borden's First Complete Private Label Quotation

Finally, a complete private label quotation on the 11 products for the entire area was submitted in August of 1965, putting the February and July quotations together with only minor modifications in the prices of certain low-volume by-products (A1848-49, 3336-70). The three most important products involved were quarts, half gallons and gallons of regular homogenized milk. Sales of these three products in the Chicago-Calumet area alone accounted for most of the total dollar volume of A&P's Chicago Unit dairy purchases. Borden's quoted prices for these products in that area under both the February and the August proposals were $.1855 for quarts, $.3430 for half gallons, and $.6860 for gallons (A3232-36, 3337-70). Borden claimed that, at these and the prices on the other products, A&P could expect to realize a saving of some $410,000

[8] A&P's practice was to insist that its suppliers make a profit so as to assure their continued viability as suppliers (A2398-99).

annually on all of its purchases of the 11 items offered in private label.[9]

Borden also claimed that its own profits at those prices would be quite low. For example, it stated it would make only a $.0019 gross profit per "point" on its July proposal for areas outside of the Chicago-Calumet area (A3305).[10] Borden did not disclose that the profit estimates it used for purposes of negotiating with A&P did not attempt to take into account the cost savings involved in minimum service drop delivery to A&P of private label and other products from Borden's new Woodstock plant, but were instead calculated on Borden's total historical costs for full service delivery of brand products to all customers (A2681-82, 4219-20).

A&P was skeptical of these modest "profits" and properly so. In Borden's May 1965 proposal (at virtually identical prices) Borden had claimed that its gross profit would be only $.0009 per point (or half of what it claimed in July—compare A3274 with A3305). In his testimony,

[9] All of Borden's estimates of what A&P would "save" by accepting Borden's offers were on the basis of three assumptions: (a) that A&P would switch all of its Chicago Unit dairy purchases of the items offered to private label under minimum service conditions, (b) that A&P's volume of sales would remain as high as it had been in the previous year, and (c) that Borden's brand label prices would remain at their existing levels. While A&P did eventually switch all its purchases of the 11 products so offered to private label, these "savings" estimates proved highly inflated because the remaining assumptions proved contrary to fact —*i.e.,* when A&P went to private label, Borden reduced its brand label prices to precisely those quoted in this first private label quotation, and there was a sharp decline in A&P's sales (A1869, 3499, 3508, 3588-89, 4715-49). The brand label price reduction alone completely wiped out the $410,000 alleged "saving" that Borden was urging on A&P in August of 1966.

[10] A "point" is a quart of milk or rough equivalent in value, such as a pint of cream; thus, a gallon of milk would be four "points" (A2202, 4721).

Borden's Mr. Minkler was unable to explain this discrepancy but he characterized the calculations as a "sales tool" designed to persuade A&P of the "tightness" of the Borden quotation and that A&P was "getting a good deal" (A1696, 1781-85).

Messrs. Bartels and Smith calculated that even a saving of $410,000 would not offset the increased labor and other expenses that A&P would incur in converting to private label and limited service (A1178-79, 1851-52, 1965).[11] They therefore decided not to accept Borden's offer and to ask Schmidt to make inquiries of other dairies (A1150, 1966, 3334).

Dealings With Other Dairies

In August of 1965, Schmidt solicited offers from the four other dairies in the area capable of providing the necessary service: Bowman, Hawthorn Mellody, Dean Milk Company, and Sidney Wanzer & Sons (A1855, 1870-71). The state of dairy competition in Chicago is shown by the fact that A&P succeeded in obtaining only one additional quotation for all of its Chicago area business—from Bowman, represented by Frank Cannon, its General Manager (A1856, 1876, 3385-406).[12]

Mr. Cannon was somewhat knowledgeable about A&P's operations as a result of having served about one-third of A&P's Chicago Unit stores prior to 1958 when Bowman was replaced by Borden (A2283-86). Since preparation of a bid would require two or three weeks of intensive work, Cannon talked to Elmer Schmidt to make sure that A&P was really interested in Bowman and was not simply using

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[11] Dairies customarily took the risk of spoilage and of competitive price reductions. Elimination of competitive allowances and of the privilege of returning merchandise for full credit were themselves costly concessions for A&P.

[12] Hawthorn Mellody and Sidney Wanzer refused to submit any proposal at all, and Dean Milk only offered to serve a few stores in Northwestern Indiana (A1853-54, 3384, 3407-09).

it as a sounding board. After their discussion, he was satisfied that A&P was acting in good faith and would seriously entertain Bowman's offer (A2288-89). Among other things, in accordance with A&P's standard policy, Schmidt advised Cannon that A&P wanted Bowman to include a margin of profit in its proposal (A2289, 2283-84).

Schmidt gave Cannon a list of the A&P stores to be serviced, and Cannon (with the assistance of accountant Parmalee and attorney Hart) spent the next two or three weeks working up a detailed quotation which he gave to Schmidt in his office on August 31, 1965. Schmidt said that he would like a few days to study it (A2298, 4596-618).

The Bowman Offer

About a week later, Cannon and Schmidt went over the Bowman offer in some detail. At that time (as Cannon and Schmidt both testified), Cannon confirmed that:

(a) Cannon's letter forwarding the offer stated that Bowman anticipated A&P's dairy product sales would amount to approximately $1 million per month (at Bowman's so-called "list" prices, which were 50% higher than its actual prices, A2307), but this was *not* a precondition of the Bowman offer (A1876-77, 2308).[13] Instead, as the offer itself stated, the quoted

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[13] Nevertheless, if A&P's sales had continued at the volume A&P had at the time of these negotiations, then according to the testimony of Robert Havemeyer (an expert dairy cost accountant), A&P's Chicago Unit sales would have approximated $1 million per month at Bowman's list prices (A2517, 5143-56, 5681). These figures, of course, refer to A&P's sales of all 22 dairy products bought by A&P, and not just the "private label" items *(ibid.)*, since it was never contemplated that there would be a different supplier (or a different method of delivery) for private label and other items.

prices were firm if Bowman could supply all of the A&P Chicago Unit stores listed (A1876-79, 2308, 2311). The offer quoted specific higher prices in the event that Bowman was allowed to serve only 70% or 50% of these stores (A2311, 3385-406).

(b) Bowman was offering the *same* prices for private label and for Bowman label products on all 22 items; in fact, Bowman would have preferred to have its own brand in A&P's stores (A1880-81, 2298-99, 2302).

(c) The column labeled "markup" in Bowman's offer (A4602) was on the basis of a 6% markup that included a profit in addition to all overhead and other costs (A1882, 2303, 2359, 2384-85).

(d) If A&P accepted Bowman's offer, Bowman was prepared to make the same offer to other customers, such as Kroger and High-Low (A2321, 2371-72, 2385).

(e) In figuring its cost savings and submitting its bid, Bowman did not take into account the savings which would have resulted from A&P's willingness to preorder merchandise (instead of taking up delivery time ordering from the driver on the day of delivery); this would have reduced Bowman's costs even further (A2303-04).

Although the subject was not discussed with A&P, the offer stated that Bowman proposed to supply milk having a butterfat content of 3.5% (A2315, 2349-51, 2381, 4596-618). Cannon testified that Bowman could readily have reduced the butterfat content to 3.4% (the amount specified in all of the Borden quotations), and a further cost saving would have resulted. It is common for dairies to remove butterfat from milk and use it in making ice

cream; as a result, butterfat has a recognized market value (A2316-18, 2381).

Cannon also testified that Bowman's bid was made on the basis of cost accounting and not on the basis of meeting competition (A2314, 2321). Bowman would have required a verified statement from any purchaser before making a bid to meet a competitive offer (A2296-97, 2313-14). Borden had a similar policy but failed to make any such request of A&P here (A1794-96, 2182-85).

Comparison of Bowman and Borden Prices

Without taking into consideration any of the other factors which made the Bowman bid more attractive, the comparison between the actual prices offered by Borden and Bowman in August of 1965 on the three most important products in the Chicago-Calumet area (which accounted for most of the total dollar volume of sales of all products in the entire Chicago Unit area) was as follows:

	Quarts	*Half Gallons*	*Gallons*
Borden Quote (A3337-70)	$.1855	$.3430	$.6860
Bowman Quote (A3385-406)	$.1696	$.3136	$.6272

The comparable hoped-for "savings" were $410,000 on the basis of the Borden proposal and $737,000 on the basis of the Bowman proposal, limiting that proposal to the eleven items offered by Borden in private label (A3479-80).

A&P's Reaction and Borden's Response

Elmer Schmidt had been repeatedly told by Borden's representatives that it had just completed construction of

the largest and most modern dairy plant in the world at Woodstock, Illinois, which would produce substantial savings to its customers (A1916-17). He was, therefore, puzzled by the great disparity between the Bowman and Borden offers. According to the Borden witnesses, he told them that Borden's offer was "not even in the ball park", "so far out of line it is not even funny", and that if Borden were to eliminate promotions and other assistance valued at $50,000 per year, even that additional saving "would not be a drop in the pocket" (A2147-48). Contrary to A&P's usual practice, Mr. Schmidt then gave Borden the option of standing by its previous offer or submitting a new offer.[14]

Messrs. Tarr and Minkler testified that these quoted remarks by Schmidt were Borden's *only* clues to the competition they were facing (A1721-22, 2149, 2187-88). At no time did Borden ask either the identity of the other bidder or the prices quoted, nor did A&P volunteer this information (A1795-96, 2183-85).

The Borden negotiators believed that, in view of their long-standing relationship with A&P, they could retain A&P's business, which they figured was worth $1,600,000 gross profit per year to Borden (A1721-22, 3377-80, 4195-96), even at a slightly higher price than any competitor might offer (A1786-87, 2189-91). Since they did not know what price they were competing with, they decided to say simply that they could double the "$410,000 saving" referred to previously and would submit a new quotation which could yield A&P a "saving" of $820,000 per year

[14] A&P's usual practice is not to permit a supplier to change its offering prices (A1082-83, 1155-56, 1970-71). In this instance, it did so because Borden had been a long-standing supplier and its bid (which essentially had not changed since February of 1965) had by then "some age to it"—*i.e.,* it was then seven months old (A1155-56, 1883-85).

(A1721-22).[15] The $820,000 constituted roughly half of the gross profit Borden was then earning on its sales to A&P, even though Borden was bearing the expense of full in-store delivery and other services which were to be eliminated thereafter on all deliveries (not just private label items) to A&P (CX 42A, A3377).[16]

According to the Borden witnesses, on being advised of the $820,000 proposal (at a meeting on September 8, 1965 attended by Minkler and Tarr), Schmidt replied "Now you are in the ballpark" (A1739-40, 2152-53).

Up until this time in the negotiations, all of Borden's private label offers had been confined to the same 11 items, which did not include glass gallons of either regular or "2%" milk. On September 17, 1965, Borden delivered a new quotation (A3419-42) which added these gallon glass items and which was immediately rejected by A&P. Schmidt stated that this was because A&P did not want the glass items in private label for various merchandising reasons (A1888-89), while Tarr testified that Schmidt also said he wanted the glass gallon items eliminated in order

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[15] The Initial Decision quotes this testimony of the Borden representatives extensively and sympathetically (A931). A fair reading of the whole opinion, in the context that no charge was made against Borden for making this offer, indicates that the administrative law judge assumed that Borden's final offer was made in good faith to meet competition.

[16] In bargaining with A&P, Borden's negotiators compared these "savings" with the $5,600,000 A&P was paying Borden per year on the 11 private label items. If such "savings" existed at all, they could only properly be compared with the approximately $7,500,000 A&P was paying Borden on all 22 items which were to be sold to A&P under the severely limited delivery conditions. (Adding the other items increases Borden's Zone I (Chicago-Calumet) sales from $4.2 million to $5.6 million (A3447, 5105); assuming the same ratio in the other Zones, the $5.6 million figure would be increased to about $7.5 million.)

to permit a comparison with other bids (A2157-58).[17] In any event, the glass gallons were excluded from the private label items in the subsequent Borden quotation, leaving Borden's price for that item at the higher level, with the estimated "savings" to A&P at the same $820,000 figure.

Borden's Final Offer vs. Bowman's Offer

Schmidt eventually told Cannon that there were "so few differences" between the two proposals that A&P had decided not to change suppliers (Cannon 6158, A2320). The fact is that the two were almost identical on the 11 items Borden was offering in private label, and such differences as there were indicate that the Bowman offer was the lower one. The specific prices for the Chicago-Calumet area for the homogenized milk items were as follows:

	Quarts	*Half Gallons*	*Gallons*
Bowman Quote (A3385-406)	$.1696	$.3136	$.6272
Borden Quote (A3489-510)	$.1712	$.3124	$.6248

In other words, Bowman was lower on the quart by 1.6 mills while Borden was lower on the half gallon and gallon items by *at most* 6/10ths of a mill per quart (or about ⅓ of 1% of Borden's quoted price). We say "at most" because the Bowman bid was actually lower when considera-

[17] The Bowman bid (which quoted the same prices for either private label or Bowman label) did include glass gallon items—at a saving of 10¢ a gallon or over $100,000 a year under Borden's prices on the "regular milk" gallon jug item alone, making the Bowman bid clearly lower (A1162, 1922, 1924, 2503-04, 2512-13, 5105). However, Schmidt's prior comparison between the Bowman bid and Borden's previous bid (A3479-80) had not taken the glass gallon saving into account (because it had not been included by Borden as a private label item). In order to continue this prior comparison, Schmidt would have had to eliminate the glass gallon items from both bids.

tion is given to the facts that Bowman was offering the same prices for an accepted, advertised brand or private label (at A&P's option), with a higher butterfat content and without preordering by A&P. The latter terms could have been changed at A&P's option, and this would have resulted in an even lower bid by virtue of the added savings to Bowman (Cannon 6141-42, 6219, A2303-04, 2381). Further, when the full line of 22 products (including the glass gallon jug) is considered, Bowman's offer was substantially lower than Borden's (A2508-09, 5105).

Libertyville Meeting

Borden's final offer was hand-delivered to Mr. Schmidt by Messrs. Minkler and Tarr at a meeting in a VFW Hall near Mr. Schmidt's home in Libertyville, Illinois, on or about September 21, 1965 (A1743).[18] Borden's representatives testified that, at this meeting, they indicated that their bid was submitted to meet competition (A1743-44, 2160). While at first he did not recall any reference to meeting competition at this meeting (A1900), Mr. Schmidt later testified as follows:

> "I am sorry, it is my recollection that *they used the phrase 'meeting competition' or 'beating competition'* as the reason for asking me to make sure that we would save and keep in our files the competitive bids."

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[18] The Borden quote delivered on September 21 purported to show estimated "savings" of approximately $880,000 annually (A1894-96, 3445-72, 3481-82), a figure based on lower raw milk costs (as of the previous May) than were then available. The parties understood that when the September raw milk prices were used, the alleged "savings" to A&P would be decreased to approximately the $820,000 that had been referred to previously (A1777, 1896), since any increase in the price of raw milk would be automatically passed on to A&P (A3452-59). The adjustment to actual raw milk prices resulted in the figures quoted above from CX 75, A3489-510.

"Q. What else was said on the subject of competitive bids, if you recall, Mr. Schmidt?

"A. Again, Mr. McInerney, I don't recall specifically, but as I indicated in previous testimony here, I have the feeling that during this period of time they made reference to it, but again, as I indicated, *I considered it salesmen's talk*. As a consequence, my memory is not sufficient to indicate when and who said it." (A1903)[19]

Mr. Schmidt did not report this comment to anyone else at A&P, either orally or in writing (Schmidt 1796-97, 1805-06, A1907-08, 1913-14).

At the same meeting Schmidt requested written assurance from Borden that the same prices offered A&P would be made available to others on proportionately equal terms (A1893-94, 1897, 1932). Minkler and Tarr did not demur but instead indicated "that such a letter would be forthcoming" (A1899). The Borden witnesses uniformly agreed with Schmidt (Schmidt 1811, A1915) that at no time did anyone from Borden ever suggest that the prices quoted to A&P for private label dairy products were *not* cost justified or would *not* be made available to others (Tarr 1015-16, A2192-93; Minkler 377-78, 385, A1792-93, 1797; Archer 1247, 1250-51, 1255-56, A1081, 1084-85, 1089-90). Moreover, Borden's chief negotiator testified that Borden fully intended to supply private label to other customers on the same terms and conditions that they had offered to A&P (A1797).

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[19] Emphasis [illegible] throughout, except where otherwise indicated. Since [illegible]en had admittedly used as "sales tools" profit figures which [illegible] not attempt to reflect the actual costs of serving A&P (A1785; pp. 9-10 above), and was embarrassed by having submitted a substantially higher quote than the competition (A1734, 2180), Mr. Schmidt had good reason for considering any reference to meeting competition "salesmen's talk". He agreed to save the competitive bids because A&P would have done so in any event (A1894, 1899).

Borden's Assurances of Legality

The assurances actually given by Borden to accompany its final private label offer to A&P were contained in a letter dated October 1, 1965 which reads in full as follows:

> "You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. *We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.*
>
> "We appreciate your patronage."

This letter was signed: "J. G. Tarr, Sales Manager, Chain Store Sales" (RA&PX 2, A4460; CX 263H, A4302; Tarr 1025, A2195).[20]

A&P's Ira Bartels recommended approval of Borden's private label offer, relying in part on the above-quoted letter (A1165-66), and forwarded Borden's letter with its private label quotation to Herschel Smith in New York (A1180, 1970, 1975-79, 4295-4334).

At first, Smith was not satisfied with Borden's letter since it did not appear to be a letter of availability in the usual form (A2010-11). He then had a meeting with Harry Archer, Borden's executive vice president in New York, at which Smith testified that the following conversation took place:

> "And I told him [Archer] that this [RA&PX 2, A4460] was not a satisfactory letter of availability as far as I was concerned because availability is not mentioned in the letter. And he said, 'Well, yes. This is a letter of availability. This is your assurance that this offer is being made available to other customers on a

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[20] Although Mr. Tarr admitted that this letter was signed by him (A2195), he and Messrs. Minkler and Malone all denied having any knowledge of who prepared this letter, except that Mr. Minkler thought it might have been discussed with Borden's counsel (A1798-800, 4240).

> proportional, equal basis and, further than that, that this letter protects A&P in all events. Generally, a letter of availability means just that, but this is an all-encompassing letter.' " (A2011)[21]

As a result of this conversation, Smith testified, he was satisfied that he had not only received a letter of availability but an assurance that Borden would "defend" its prices and would "hold A&P harmless" with respect to them (A2011-17, 2043-45).

Mr. Archer, called as a witness by complaint counsel, could not recall discussing this letter of assurance with Smith at all (A1085). He did admit, however, that similar assurances of legality were customary (A1089).

A&P's Acceptance

Since "there was no such thing as a published price" for dairy products in the Chicago area (Schmidt 1730, A1868), and dairies generally did not disclose their net prices to particular chain store customers (Minkler 371, A1790; Cannon 6152-53, A2314-15), in considering the Borden proposal A&P had only the Bowman offer, Borden's assurances, and A&P's own experience to rely on. Its experience included the fact that Mr. Smith had learned that a rough guide used by dairies in figuring private label prices was to add 6¢ per quart to the price of raw milk—2¢ for packaging, 2¢ for delivery and 2¢ for processing, overhead and profit (A2006-08, 2235-36, 2239-52, 2255-61). Both Borden's and Bowman's prices were very close to the prices that would result from applying this rule of thumb

[21] A similar interpretation was given by Borden in explaining subsequent assurances given to A&P *in haec verba* regarding other private label prices (RA&PX 16-18, A4483-86; Bartels 1924-35, A1167-78). Borden stated in writing that these same words mean "that [Borden's] prices *are proper under applicable law to cover any implications that may be required as to availability under the Robinson-Patman Act*" (RA&PX 17, A4484).

(known as the "2-2-2 formula") (RA&PX 137B, A5413).[22] While A&P had no way of knowing what Borden's actual costs would be under the private label program, the validity of this guide was substantiated by Mr. Smith's dealings with Borden in New York (where Borden applied the 2-2-2 formula precisely in dealing with A&P) and with other dairies elsewhere (A2003-08, 3306-14).

After receiving the approval of A&P's Legal Department, Mr. Smith authorized the acceptance of the Borden private label offer, and the arrangement went into effect on or about November 1, 1965 (A1861, 2017, 2045-46, 3483-84, 3487-88).

Borden Offers to Others

In November, 1965, Borden solicited the business of Kroger's 64 stores in the Chicago area, offering the same prices that A&P was paying for private label, but Kroger rejected the proposal because Borden's prices were too high (A1408, 1411-17, 1419, 1421, 1424-27, 1433, 1435, 6032-41). Thereafter, Borden made similar private label solicitations to National Tea and K Mart (A2426-32, 6065-87). Consolidated Foods bought Borden brand milk and other products at a discount from "list" of 37% (A2424-25, 4283) as compared with the 37.9% A&P was then receiving on private label under minimum service conditions (see A1007-16, 9/67-5/68).

Even more significantly, in September, 1968, Eagle Food Centers received a private label proposal from Borden at prices *lower* than those Borden was charging A&P. A&P became aware of this only when Borden gave the A&P stores in Eagle's area a reduction in private label prices to bring them in line (A1418, 1431-32, 1868, 1924-26, 6042-64).

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[22] On the other hand, Borden's previous quotation in August 1965 (A3337-70) was in excess of the formula by some 3¢ on quarts and half gallons and 6¢ on gallons (A5413).

Subsequent Events

In April of 1971, while Borden was still supplying it, A&P again solicited offers for its Chicago area business and received lower prices from two other Chicago dairies, Dean Milk and Spinney Run. In February of 1972, A&P terminated Borden as a supplier in the Chicago area (A2265-79, 4569-94).

Shortly after this complaint was issued, a treble damage action alleging similar charges was brought in the United States District Court in Chicago, *Samuel E. Parker, et al.* v. *A&P and Borden,* Dkt. 71-C-3075, purportedly on behalf of a class consisting of Borden customers who were allegedly discriminated against. A&P denied these allegations and cross-claimed against Borden for indemnification based on Borden's above-quoted representations and warranties of legality to A&P in 1965.

Perhaps as a result of these events, the hearings below were marked by clashes between Borden and A&P as well as between Commission counsel and A&P. It was clear throughout that Borden (not being charged with any Robinson-Patman violation) had no incentive to assist A&P by showing that Borden had defenses to any such charge.

Summary of Argument

The basic issue presented by this appeal is whether the Commission properly concluded that all of the statutory elements of a violation of Section 2(f), as well as the absence of any statutory defense, had been established by substantial evidence.[23] We contend that it did not, for a variety of independent reasons.

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[23] *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962).

To begin with, the Commission itself found, in reversing the FTC Act count, that it would be "contrary to the public interest" to impose on a buyer who has a competitive bid a duty to disclose its terms to another seller who goes below it stating that he is meeting competition (A1027-28). Yet that is the practical result of the Commission's holding that A&P is guilty of a 2(f) violation here. Under the ruling below, future buyers must either tell the low bidder that his price is unacceptable because it is too low, or deprive him of the business and accept the higher price in silence.

The Commission found that since A&P made no material misrepresentations (A1026, n.5), A&P's acceptance of Borden's bid (without informing Borden of the terms of Bowman's bid) was not an unfair trade practice. Under these circumstances, we submit that the Commission erred in finding that A&P was not entitled to the benefit of the meeting competition defense.[24] That conclusion is reinforced by the independent grounds for reversal that (a) the Commission failed to find that the defense was unavailable to Borden or that Borden had violated the Robinson-Patman Act, (b) the Bowman bid was actually either equal to or lower than the Borden bid, and (c) even if such a subjective attitude were relevant (which we deny), the evidence does not support the FTC's finding that A&P believed that the Borden bid was "substantially lower" than the Bowman bid (Point I).

The Commission also erred in holding that Commission counsel were not required to show that the Borden price was not cost justified, as well as in failing to find lack of

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[24] Section 2(b) of the Clayton Act, as amended, gives the seller a defense to Robinson-Patman Act charges if he can show "that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor". Knowledge of the unavailability to the seller of both this defense and the cost justification defense in Section 2(a) are prerequisites to a buyer's liability for violating Section 2(f). *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 74 (1953).

cost justification itself, and in its finding that A&P knew the prices were not cost justified (Point II).

In addition, the Commission committed prejudicial error in refusing to consider A&P's cost justification studies because of imperfections attributable to the Commission's own delay in instituting this proceeding (Point III).

Further, it was not proven by substantial evidence that A&P was, in fact, the beneficiary of a price discrimination (Point IV), that A&P's Illinois purchases were "in commerce" (Point VA), or that the allegedly injured Indiana customers were representative (Point VB).

Finally, we submit that the order of the Commission was unwarranted and unnecessarily broad even if a violation had been shown (Point VI).

Taken together the Commission's rulings, particularly with respect to the meeting competition and cost justification defenses, are dangerously destructive of a buyer's right to bargain vigorously with sellers to reduce prices. The ruling here was that a buyer is not free to accept a lower competing bid, even when it is offered by the seller in good faith to meet competition, and even though the buyer is unaware of the seller's prices and terms to others, *unless* the *buyer* can prove to the Commission's satisfaction that the price reduction is cost justified by the seller's cost savings in dealing with him. Sanctioning such a rule here, where any difference between the competing bids was marginal at best, would have a particularly deleterious impact on competition in buying. "Any chipping away at the availability of the 'good faith meeting competition' defense simply lends the sanctions of the Patman Act to encourage resistance to price competition." Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility,* 57 Nw. U. L. Rev. 173, 178 (1962). We have here far more than a mere chipping away, we have a body blow to competitive buying.[25]

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[25] Edward Levi has commented on the warring philosophies of the Sherman and Robinson-Patman Acts as follows:

In sum, the decision below is contrary to *Automatic Canteen Co. of America* v. *FTC,* 346 U.S. 61 (1953), and extends the application of Section 2(f) far beyond its proper limits. One leading commentator has described the Robinson-Patman Act as continuing "to unfold like an accordion to produce legal dissonance, antithetical antitrust aberrations, new weird interpretations, and constantly dilating debate".[26] This decision, if allowed to stand, would bring the discordant notes from that accordion to a crescendo.

> "At one level the conflict between the Robinson-Patman Act and the Sherman Act is this: the Robinson-Patman Act promotes that uniformity of prices and control over prices which the Sherman Act and also the Federal Trade Commission Act deem to be illegal. An agreement between competitive purchasers as to what they will pay a single seller is illegal under the antitrust laws. The same uniformity in price, however, may be required under the Robinson-Patman Act. Uniformity of prices, terms and conditions among sellers may be evidence of a price fixing arrangement under the antitrust laws. Under the Robinson-Patman Act, however, not only is uniform treatment as among customers encouraged, and the likelihood of price reductions to individual customers in response to market conditions thereby diminished, but in addition where there is any deviation from uniformity the act makes it important to have or to seek to have the most intimate knowledge of the terms offered by one's competitors. This promotes price rigidity and produces evidence of illegal concert of action." Levi, *The Robinson-Patman Act—Is It in the Public Interest?* 1 ABA Section of Antitrust Law 60, 61-62 (Sept. 17-18, 1952).

See also Anonymous, *Eine Kleine Juristische Schlummergeschichte,* 79 Harv. L. Rev. 921 (1966).

This Court has recently taken note of the sentiment in favor of a narrow construction of the Robinson-Patman Act. *FLM Collision Parts, Inc.* v. *Ford Motor Co.,* 5 Trade Reg. Rep. (1976-2 Trade Cas.) ¶61,103, at 70,000 n.7 (2d Cir. 1976). As Justice Harlan has put it, it is desirable "to hew as closely as possible to the wandering line that the statute has drawn. . . ." *FTC* v. *Fred Meyer, Inc.,* 390 U.S. 341, 360 (1968) (Harlan, J., dissenting).

[26] Austern, *Presumption and Percipience about Competitive Effect under Section 2 of the Clayton Act,* 81 Harv. L. Rev. 773, 774 (1968).

ARGUMENT

I.

The Commission Erroneously Deprived A&P of the "Meeting Competition" Defense.

The Commission found that the Bowman bid was both operative and comparable to Borden's, specifically reversing Judge Hinkes' conclusion to the contrary (A1039, n.17). Nevertheless, it held that since A&P "contemporaneously concluded that Borden's [final] bid was 'substantially better' than Bowman's . . . A&P, therefore, cannot assert the seller's meeting competition defense" (A1038). While this record demonstrates that the Bowman offer was better than Borden's, and that A&P believed that any difference between the two offers was not substantial but a mere "matter of mills", we point out preliminarily that, even under the Commission's distorted view of the facts, its finding that A&P violated Section 2(f) is contrary to the public interest.

A. As the Commission Itself Recognized, It Is Contrary to the Public Interest to Preclude a Buyer Like A&P From Accepting a Competitive Offer Merely Because It Is the Lower Bid.

The Commission's ruling in this case would require that, in order to comply with Section 2(f), A&P would have had to either reject the Borden bid or inform Borden that its bid was too low and insist on paying Borden the higher price quoted by its competitor. Yet in dismissing Count I (attacking the same A&P conduct under Section 5 of the FTC Act) the Commission expressly found that such a result would be "contrary to normal business practice and,

we think, contrary to the public interest" (A1027).[27] It went on to explain:

> "We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (A1028)

Nowhere does the Commission explain why these same results should be countenanced when reached under Section 2(f) of the Robinson-Patman Act.

The inconsistency of the Commission's position is highlighted by its own analysis: "We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then [have to] state whether such bid meets, beats, or loses to another bid. The seller would then submit [successive bids] until finally he is able to ascertain his competitor's bid." (A1028). Having found this result to be contrary to the public interest, the Commission concluded that A&P had no duty of disclosure to Borden, and no responsibility "to tell Borden whether a legal defense is available" (A1028 & n.7). Yet the Commission's 2(f) ruling would in practice impose such a duty on A&P as the only alternative to rejecting the Borden bid altogether and accepting what the Commission considered a higher offer.

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[27] The Commission here quoted approvingly the following language from *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied,* 380 U.S. 906 (1965):

> "The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place."

The Commission recognized that buyers frequently solicit bids from a number of sources and accept the best offer without telling the low bidder that he has gone further than he needed to, and that the public has a strong interest in the preservation of this business practice. Through such competitive bidding sellers are persuaded to pare their prices to levels which will produce for them no more than a reasonable return on their actual costs. The practice tends to destroy rigid or stabilized pricing patterns and to produce instead the competitive pricing which the antitrust laws were designed to secure. While clearly discerning this in Count I, the Commission's ruling under Count II would discourage or preclude these beneficial results.

B. A&P Is Entitled to the Benefit of Borden's Meeting Competition Defense.

The Commission's dismissal of Count I exonerates A&P of any charge of false or misleading statements (which might fall within the condemnation of Section 5 of the FTC Act), and makes it clear that the most A&P could have been charged with was mere silence.[28] It is also indisputably clear that A&P was dealing with Borden at arm's length and without collusion. Under these circumstances, both common sense and public interest considerations require assessing the meeting competition defense from the seller's point of view. In other words, if a seller so situated reasonably and in good faith makes an offer which he believes is responsive to a competitive offer, then he is free of liability under Section 2(a)—even though his bid is, in fact, lower than it needed to be. Conversely, the buyer should be free of Robinson-Patman liability in accepting that offer if he

[28] It noted that there were some allegations of possible misrepresentations (cited at note 3 of its opinion), but these *"are not relevant to the charge"* (A1026, n.5). While A&P refuted these irrelevant and immaterial accusations in detail below, little purpose would be served in doing so here.

has not acted collusively with the seller and if he believes that the seller has acted in good faith to meet competition.

The correctness of this view is strongly supported by the Supreme Court's ruling in *Automatic Canteen Co. of America* v. *FTC, supra.* The Court there interpreted the Section 2(f) phrase making it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section". It held that, in order for liability to exist, the Commission must show that the buyer knew, or had reason to know, that the price was offered in violation of Section 2(a)—which applies, of course, only to sellers.[29] The Court went on to say that:

> "If the requirement of knowledge in § 2(f) has any significant function, it is to indicate that the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was *little likelihood of a defense for the seller,* nevertheless proceeded to exert pressure for lower prices." (346 U.S. at 79, emphasis added)

Applying that reasoning to our case, since A&P had every reason to believe that Borden would have the meeting competition defense available to it, then A&P as a buyer should also have the benefit of that defense.

The very language of the statute shows that Section 2(f) liability is entirely derivative from Section 2(a) liability; in other words, if the seller has a defense, so does the buyer. Section 2(f) reads:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly

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[29] Indeed, the wording of the charging language of Count II here is the same: "A&P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act. . ." (Count II, paragraph 13).

to induce or receive a discrimination in price *which is prohibited* by this section." (15 U.S.C. § 13(f), emphasis added)

Thus, Borden must be guilty of a violation of Section 2(a) before A&P can be held liable under Section 2(f) for inducing such a violation.[30] In *Automatic Canteen Co. of America* v. *FTC, supra,* the Supreme Court said:

"It is therefore apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . . ." (346 U.S. at 70)

See also F. Rowe, *Price Discrimination under the Robinson-Patman Act* 421 (1962).

This point is not met by saying that "the Commission has not concluded that Borden would have a valid meeting competition defense" or even that "it is very probable that Borden did not have such a defense" (A1040 & n.19).[31] The burden was on counsel supporting the complaint to prove every element of a violation of Section 2(a) by Borden as a predicate for a finding of a Section 2(f) violation by A&P, and this includes the burden of showing that Borden had no defense to the 2(a) charge. As the Court said in *Mid-South Distributors* v. *FTC,* 287 F.2d

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[30] Congressman Utterback, one of the floor managers of the Robinson-Patman Act, stated at the time of its passage by the House of Representatives: "This paragraph [§ 2(f)] makes the buyer liable for knowingly inducing or receiving any discrimination in price *which is unlawful under the first paragraph of the amendment* [§ 2(a)]" 80 Cong. Rec. 9419 (1936).

[31] The Commission points out that it had discretion not to make a Robinson-Patman charge against Borden. However, that decision could hardly lighten the Commission's burden of proof vis-a-vis A&P or deprive it of a meeting competition defense which it would otherwise have had.

512, 517 (5th Cir. 1961), referring to both the cost justification and meeting competition defenses:

> "[I]n a § 2(f) proceeding, it is a part of the Commission's burden of going forward with the evidence to show that the buyer *knew* that the seller could *not* justify the price differential under either one or both [of these two defenses]." (emphasis in original)

Not only has there been no finding that Borden's bid was *not* made for the purpose of meeting competition, but complaint counsel's whole case against A&P was premised on the argument (warmly endorsed by the administrative law judge below) that Borden's final private label proposal *was* offered in good faith to meet competition (A930-31, 933-34, 943).[32]

Indeed, the Commission itself asserted Borden's reliance on the meeting competition defense as proof that A&P knew the Borden offer was not cost justified (A1046). Curiously, the Commission concluded that Elmer Schmidt (A&P's new Unit buyer who had not graduated from college, much less law school) should have deduced from Borden's reference to meeting competition "that it was likely that Borden did not have a cost justification defense" (A1046).

The Commission rejected A&P's meeting competition defense on the ground that "even though a seller has a defense to a Robinson-Patman Act charge, a buyer can still violate Section 2(f)" (A1041), citing *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). The *Kroger* case decided only that there should be a "lying buyer" (or, more precisely, a "fraudulently induced offer") exception to the requirements of

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[32] It is settled that, even if Borden's price was lower, that would not vitiate its meeting competition defense (see pp. 39-40 below).

Section 2(f). In that case, the Commission held the seller (Beatrice) not liable for a violation of Section 2(a) because of the meeting competition defense but held that the buyer (Kroger) violated Section 2(f) when it induced the seller to offer a discriminatory price by misrepresentations as to the existence of competing bids. The Court of Appeals affirmed as to Kroger precisely because it had affirmatively misrepresented the competing seller's bid in order to mislead Beatrice and thus knew that Beatrice's bid was "not in fact responsive to an actual lower bid" (438 F.2d at 1377).[33]

The rationale of *Kroger* is wholly inapplicable here, not only because A&P's buyer did not lie but also because the final Borden bid was undeniably "responsive to an actual lower bid" of Bowman which was indisputably well below Borden's initial offer. In any event, the *Kroger* case has never been followed by any other court. It was ignored in *Rutledge* v. *Electric Hose and Rubber Co.,* 327 F. Supp. 1267, 1276 (D.C.Cal. 1971), *aff'd,* 511 F.2d 668 (9th Cir. 1975) ("since plaintiffs have shown no section 2(a) violation, the [buyer] defendants have not violated § 2(f)") and in *Harbor Banana Distributors, Inc.*v. *FTC,* 499 F.2d 395, 39? (5th Cir. 1974) ("A prohibited discrimination is a

[33] The Court did make the statement (without citing any authority) that in order for the buyer to have a defense "the prices induced must come within the defenses of that section [2(b)] not only from the seller's point of view but also from that of the buyer" (438 F.2d at 1377). However, it is clear from the opinion as a whole that the ruling was based on the Court's conclusion that, because of Kroger's misrepresentations, "the prices offered by Beatrice and received by Kroger were not in fact within the defense of Section 2(b)" (*Id.*). This conflicts with the Commission's ruling that Beatrice did have such a defense. Moreover, the *Automatic Canteen* case does not speak of "prices . . . within the defense of Section 2(b)" as if it were merely a matter of comparing two prices, but rather of "prices . . . within one of *the seller's* defenses. . " (346 U.S. at 74).

condition precedent to a finding of unlawful conduct under § 2(f)").[34]

While the correctness of *Kroger* need not be considered here, that ruling surely should not be extended to this factually dissimilar case so as to require a buyer to accept a lower bid at its peril. Here, A&P made no misrepresentation and had every reason to suppose that Borden had a meeting competition defense. The Commission has not found either that Borden did not have such a defense or that A&P knew that it did not. On the other hand, it has found that A&P had no responsibility to tell Borden that the defense was not available (A1028, n.7). Under these circumstances, the 2(f) charge cannot be sustained.

C. The Borden Offer Was Actually Either Less Favorable Than, or Substantially Equivalent to, the Bowman Offer.

Despite the *arguendo* assumptions made above, complaint counsel did not prove either that the Borden bid was substantially lower than Bowman's or that A&P knew that fact. On the contrary, the record shows that Bowman's offer was either lower than Borden's final bid or equivalent to it.

In support of its conclusion that the Borden bid was "substantially better" than the Bowman bid, the Commission cites only the bids themselves (CX 50, 62 and 75F-J, A3385-406, 3445-72, 3494-98) and a superficial comparison of them by Elmer Schmidt (CX 263B, A4296). The opinion

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[34] Even if it is proper to prohibit conduct of the kind dealt with in the *Kroger* case, reaching that result does not necessarily require doing violence to the language and logic of the Robinson-Patman Act. We submit that Section 5 of the FTC Act, as construed by the Supreme Court subsequent to the decision in the *Kroger* case in *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972), provides a more appropriate statutory vehicle for dealing with a "lying buyer".

does not consider the overwhelming evidence that this comparison was unsound, nor does it address the plain fact that the price differences were in small fractions of a cent.

The deficiencies in the simplistic comparison on which the Commission relies include Mr. Schmidt's failure to take into account that the two bids were based on different raw milk prices, that the Bowman bid was based on 3.5% butterfat milk, whereas the Borden bid was based on 3.4%, and that different prices were quoted for each dairy's geographical zones which were not co-extensive with each other.[35] Even more significantly, the Schmidt comparison was limited to the 11 private label items offered by Borden, whereas the successful bidder was to receive all of the A&P business on all 22 items—so that the price for the entire package was the only economically important price. Moreover, Schmidt did not take into account that the Bowman bid quoted the same prices for private label and for brand label products, and would have saved A&P the expense of advertising its own brand of milk.

On the other hand, the record contained abundant evidence, ignored by the Commission, that a proper comparison shows that the Bowman bid was lower. For example, Messrs. Schmidt, Bartels and Smith of A&P each separately reviewed the two bids prior to the hearing at the

[35] On this point the Commission comments that "the Bowman bid *may* not have called for 3.5%" (A1039, n.18), which is hardly a finding that it did not. That it did is supported both by the written offer itself (A3385-406) and by the uncontradicted testimony of Mr. Cannon of Bowman (A2315, 2349-51, 2381). The Commission also comments that "Borden's butterfat level was probably about 3.45%" *(ibid.)*. While it is not surprising that Borden, in attempting to meet a minimum requirement, averaged slightly more than the requirement, this misses the point. The question is not what butterfat content the milk actually had, but what butterfat content the seller was contractually bound to supply. If Bowman had been requested to meet a minimum of 3.4% rather than 3.5%, Cannon testified that it could easily have done so and would have lowered its bid (A2316-17, 2381).

request of counsel for A&P and each separately demonstrated in his testimony that, when the bids were compared on the basis of the same raw milk cost and butterfat content, the Bowman bid was lower on quart, half gallon and gallon containers of homogenized milk in the Chicago area (A1161-62, 1918-20, 2019-2021, 2049-50). Further, A&P's expert witness, Mr. Robert Havemeyer of Case and Company, Inc., a dairy cost analyst, demonstrated in a more precise and complete fashion the actual relationship between the two bids (A2491-2511, 5105-42, 5143-56). He showed that in the area designated by Borden as Zone 1 (referred to as the Chicago-Calumet area), comprising 70 to 75% of the anticipated private label volume (A2493, 3445-72):

(a) Bowman's bid was more than $220,000 lower than Borden's bid if all 22 of the items to be supplied are taken into account.

(b) Bowman's bid was more than $140,000 lower than Borden's bid on the most important items—*i.e.*, quarts, half gallons and gallons of homogenized milk (putting the two bids on the same basis of 3.5% butterfat content and including milk sold in glass containers).

(c) On any basis, the Bowman bid was either lower than the Borden bid or very close to it. Even if the comparison is confined to the 11 items which Borden offered in private label, the Bowman bid was still lower than the Borden bid by $13,920.47, adjusting for butterfat content. If no adjustment is made for butterfat, and the comparison is limited to the 11 private label items, the Borden bid would be lower by only $11,425 on some $3,600,000 of purchases by A&P, or 1/3 of 1% (A5105).

It is evident that a proper comparison requires more than just setting the quoted prices side by side (as Mr. Schmidt did in the comparison on which the Commission

relied). For example, in *Harbor Banana Distributors, Inc. v. FTC, supra,* the Court found it necessary to consider method of delivery along with price to make the competing offers comparable. Similarly, the Court in *Power Replacements Corp. v. Air Preheater Co.,* 356 F. Supp. 872 (E.D. Pa. 1973), ruled:

> "[I]n judging whether the seller has met rather than beaten his competition, we must do more than make a superficial dollar and cents comparison between the discriminatory price and the assumed competitive price." (356 F. Supp. at 898)

In other words, the more detailed studies cited above, which made those adjustments which were necessary to make the bids comparable, were the only appropriate comparisons of these two bids.[36]

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[36] The Commission argues that, in comparing the bids, it would be necessary to adjust the Bowman prices upward (by some unstated amount) because "Bowman would not be able to give A&P such a low price because A&P's volume was less than the $1 million per month stipulated in the Bowman offer" and because "Bowman would have to increase the days of delivery in the Gary-Hammond area" (A1039). This speculation is not supported by the record. As to any volume requirement, we have already seen that Mr. Cannon testified, without contradiction, that the bid was not conditioned on a monthly volume of $1,000,000 (pp. 11-12 above), and that, in any event, A&P's monthly volume approximated $1,000,000 at Bowman's "list" prices (p. 11, n.13 above).

As to the days of delivery in the Gary-Hammond area, the Bowman bid specified 3 days-a-week delivery and Mr. Cannon testified that this was permitted under the union rules (A2375-76). John F. Szczepaniak (a route forman for Borden in the Gary-Hammond area called by Commission counsel) testified that Borden's union contract would permit as few as four deliveries per week (A2115-16). The applicable union contract, on which the Commission apparently relied, contains no provision requiring 6-day delivery (A4420). In any event, Mr. Havemeyer showed that 6-day

D. The Commission's Finding That A&P Viewed the Borden Bid as "Substantially Better" Than the Bowman Bid Is Erroneous and Provides No Basis for Depriving A&P of the "Meeting Competition" Defense.

The Commission's conclusion that A&P regarded Borden's bid as being "substantially better" than Bowman's is based upon a single snippet of confusing testimony by Herschel Smith (A&P's headquarters dairy buyer in New York) concerning the analysis of the bids by Elmer Schmidt in CX 65 (A3479-80), which was sent to Smith by Ira Bartels. The erroneous impression conveyed by that excerpt can best be clarified by putting it in context. Mr. Smith testified:

> "A. I observed that the Bowman and Borden quotations were very close to each other, that the gallons and half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons *the difference was almost infinitesimal,* it was so small.
>
> "Q. And even though the difference may have been infinitesimal, you at that time decided to accept the Borden quotation, is that right?
>
> "A. That is right. The document itself looks to be a much more attractive, considerably more attractive offer.
>
> "Q. Which document, sir?
>
> "A. The document that Mr. Bartels sent with this letter [CX 65, A3479-80] shows that the Borden offer is substantially better than the one from Bowman.
>
> * * *

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delivery would result in a very modest increased cost which would put the Bowman bid no more than $464 above the Borden bid in the Chicago-Calumet area—out of over $3,600,000 worth of business on the 11 private label items alone (A6000).

"Q. And yet, if I understood you correctly, comparing the unit prices, the difference was infinitesimal at best?

"A. Yes.

"Q. Now—

"A. *It was a matter of mills.* Maybe 'infinitesimal' isn't a good word there. It was small, mill differences." (A2018-19)

The aptness of Mr. Smith's spontaneous testimony that the difference between the two offers was a mere matter of mills is clear from the analysis made above and from the fact that the actual unit prices quoted in the two bids reveal that Bowman was *lower* than Borden by 1.6 mills on the quart and higher than Borden by no more than 6/10ths of a mill per quart on the half gallon and gallon items—differences which *at most* amounted to only ⅓ of 1% of Borden's quoted prices (p. 16 above).

In other words, putting Mr. Smith's "substantially better" comment in context, it was simply his characterization of the misleading impression conveyed by "the document that Mr. Bartels sent"—*i.e.,* the very same misleading comparison sent by Elmer Schmidt to Ira Bartels (A3479-80) and forwarded by him to Herschel Smith (A4296). That comparison indicated that the Borden offer would save A&P almost $145,000 annually in excess of the savings offered by Bowman. At the time it was submitted, both Bartels and Schmidt were aware (but neglected to inform Smith) that when the Borden prices were updated to reflect the September 1965 raw milk cost (the cost used by Bowman in its price quote, A3385-406), the purported annual difference in the savings to A&P would be reduced to about $82,000 (A3481-82). When Smith followed Bartels' and Schmidt's recommendation and approved the Borden private label arrangement, he was also unaware of the other differences between the two quotations that eliminated this $82,000 and made Bowman's preferable.

Thus the Borden proposal was approved by A&P, not on the basis of any considered conclusion that the Borden prices were "substantially better" than Bowman's prices, but on the basis that there was only "a matter of mills" difference between them. Or, as Mr. Schmidt subsequently advised Mr. Cannon, since there were "so few differences" between the two proposals, A&P had decided not to change its dairy supplier (A2320).

In a good faith meeting of competition situation, the defense is established if the action taken was "about as fair and reasonable . . . as anyone could expect". *Sun Oil* v. *FTC,* 294 F.2d 465, 482 (5th Cir. 1961), *rev'd on other grounds,* 371 U.S. 505 (1963). It follows from the nature of the bargaining process that considerable flexibility must be allowed the defendant. *Jones* v. *Borden Co.,* 430 F.2d 568, 573 (5th Cir. 1970); *Callaway Mills Co.* v. *FTC,* 362 F.2d 435, 443-44 (5th Cir. 1966); 4 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 32.02[2] at 32-61 (1976). The Attorney General's National Committee to Study the Antitrust Laws expressed it as follows:

> "The Committee further believes that a seller should not be forced to meet a competitor's equally low price to the last fraction of a cent . . . . [A] mechanical test would defeat the objective of permitting a realistic equalization of an actual competitive situation." *Report of the Attorney General's National Committee to Study the Antitrust Laws* 183-84 (March 31, 1955).

Similarly, the Commission itself has held that a seller can be exonerated on the basis of the meeting competition defense even though he actually "beat" the competitor's prices. In the *Beatrice* case, Commissioner Jones said:

> "Precisely meeting the exact prices of competitive bids can have no realistic meaning in the context of this case. Here there was no question of meeting competitive offers to maintain or obtain a share of

the market. This was a winner-take-all bidding situation. . . . The obvious objective of the Beatrice representatives was to make an offer, which would be sufficiently more acceptable than any other offer to tip the scales in their favor. . . .

"To require that Beatrice adhere to a precise 'Meet but not beat' criterion under these circumstances, where the Beatrice representatives otherwise exhibited every element of good faith, is not reasonable. To hold otherwise would be effectively to outlaw such bidding situations by insisting upon an artificial and rigid test." *Beatrice Foods Co.*, 76 F.T.C. 719, 811-12 (1969), *aff'd sub nom. Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971).

The Ninth Circuit applied the same principle in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956), where it said:

"even if Arden had gone beyond the technical limits of meeting an equally low price of a competitor and placed the price lower than any competitor, it would not have been a violation of this statute." (231 F.2d at 366)

See also Forster Mfg. Co. v. *FTC,* 335 F.2d 47 (1st Cir. 1964); *Kohner* v. *Wechsler,* 1973-1 Trade Cas. ¶ 74,465 at 94,073 (2d Cir. 1973) (Timbers, J., concurring).[37]

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[37] Supporting this same result is the *de minimis* doctrine as developed in the cost justification cases. The *most* by which the Borden bid could have been lower than the Bowman bid is $82,600, or about 1½ percent of the total estimated annual business (even limiting it to the 11 items on which Borden offered private label and not making the more meaningful comparisons noted elsewhere). Moreover, as demonstrated above, the differences in terms of unit prices are in fractions of mills at most. Under the *de minimis* doctrine, where a cost study reveals a small residue between the price differential and the cost differential, the defense may still be made out. One reason for this result is the difficulty inherent in any attempt to show cost justification. *See United States* v.

We have argued above that, so long as a buyer believes the seller to be bidding in good faith and does not act collusively with him, the buyer can accept a bid which is lower than any competing one. Certainly he should be free to do so when the bid is no more than marginally lower, as it clearly was here, and when it is at a level which would satisfy the seller's responsibility under Section 2(a) even if the seller knew what the competing price was.

Building on its finding that A&P "contemporaneously concluded that Borden's bid was 'substantially better' than Bowman's", the Commission's opinion states: "A&P, therefore, cannot assert the seller's meeting competition defense" (A1038). This suggests that, even if A&P was misled into reaching that plainly erroneous conclusion back in 1965, A&P should now be punished for that subjective state of mind by being deprived of its 2(b) defense. The Commission cites no authority for such a startling proposition, and we are aware of none. On the contrary, if the Bowman bid (which, as we have seen, was indisputably legal) was lower than Borden's, then two things necessarily follow: first, Borden's bid was all the more clearly a good faith effort to meet competition, and second, A&P's acceptance of the higher bid could not conceivably cause any competitive injury or any injury to anyone but A&P. Accordingly, even if the Borden salesmen were actually able to persuade A&P that the Borden bid was better, that surely affords no basis for finding A&P liable here.

Borden Co., 1961 Trade Cas. ¶ 69,946 (N.D. Ill. 1961), *rev'd on other grounds*, 370 U.S. 460 (1962). Similar complexities are involved here in comparing the Borden and Bowman bids.

II.

Complaint Counsel Failed to Establish That the Price Received by A&P Was Not Cost Justified and That A&P Knew That It Was Not.

In *Automatic Canteen Co. of America* v. *FTC,* 346 U.S. 61 (1953), the Supreme Court held that, in a proceeding against a buyer under Section 2(f), counsel supporting the complaint must come forward with evidence which proves *both* that the prices paid by the respondent buyer were not cost justified *and* that the buyer knew or should have known this fact. The Commission not only improperly relieved complaint counsel of that burden here, but the evidence was insufficient to support the necessary findings in any event.

A. The Commission Improperly Relieved Complaint Counsel of the Burden of Proof Requirements Imposed by *Automatic Canteen.*

The opinion below shifts the burden of proof in a manner which is novel and plainly contrary to *Automatic Canteen.* Although it found that "A&P and Judge Hinkes are mistaken in concluding that the *Automatic Canteen* case dealt with the burden of proof issue" (A1042), the Commission did recognize that: "As in the case of meeting competition, a buyer is not liable under Section 2(f) if the lower price he induces is within the cost justification defense *or* if the buyer is unaware that the price is not protected by that defense" (A1041). The Supreme Court put it in *Automatic Canteen* that "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses" (346 U.S. at 74).

The Commission here, however, devised an intricate and novel set of rules with respect to the burden of proof on cost justification. It ruled that:

(a) The Commission has the burden of going forward with evidence that the buyer was "reasonably aware" that the prices were not cost justified (A1042).

(b) If the Commission carries this burden, then the buyer has the burden of going forward with evidence that "it did not know or could not reasonably have known that the price differential was not cost justified" (A1044).

(c) If the buyer fails to carry this burden, then "the buyer must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers" (A1044).

(d) Finally, while "the burden of persuasion as to the issue of whether the buyer had the requisite knowledge" is with complaint counsel, "the burden of persuasion as to the issue of whether the prices are, in fact, cost justified *rests with the buyer*" (A1045).

These rulings taken together stand *Automatic Canteen* on its head. First, they assume that complaint counsel can show that the buyer was "reasonably aware" that the prices were not cost justified without showing that they were, in fact, not cost justified. Second, they permit complaint counsel to introduce evidence that the buyer was "aware" that cost justification might be lacking and then rest their case without showing that in fact there was no cost justification. Finally, they severely undercut the policy of *Automatic Canteen* by placing on the buyer the burden of persuasion as to the existence of cost justification, and by holding the buyer to the same standard of proof as a seller.

In *Automatic Canteen,* the Supreme Court made clear that the Commission had the burden of going forward with evidence both that the price difference was not cost justified and that the buyer knew it. It described this as "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof. . ." (346 U.S. at 79).[38] It stated that these burdens may be met by showing that the buyer bought in the same quantities as his competition and was served in the same manner but at a substantially lower price—and that he knew these facts (346 U.S. at 80). This evidence would, of course, prove both that there was no difference in cost and that the buyer knew it. The Court pointed out, however, that if the methods or quantities differ, then even though the buyer knew he was receiving a substantially lower price (in that case, it was up to 33% less), the Commission must still show:

> "that such differences *could not* give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, *and* that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." (346 U.S. at 80)

The Commission in this case improperly relieved complaint counsel of proving the first of the above-quoted essential elements of their case as stated by the Supreme Court.

Nor is there any basis for the Commission's shifting to the buyer the burden of persuasion on the cost justification issue. The Commission correctly notes (A1042) that the Supreme Court in *Automatic Canteen* stated:

> "we have dealt only with the burden of introducing evidence and not with the burden of persuasion, as to

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[38] In his dissenting opinion, Justice Douglas stated: "The Court's construction not only requires the Commission to show that the price discriminations were not justified, it also makes the Commission prove what lay in the buyer's mind" (346 U.S. at 85).

which different considerations *may* apply." (346 U.S. at 82)

Yet the same considerations which mandate placing on the Commission the burden of going forward with the evidence on this point also mandate that the Commission carry the burden of persuasion. "Considerations of fairness and convenience", as well as "the fact that the buyer does not have the required information and for good reason should not be required to obtain it" (346 U.S. at 78) require the same result in each case.

Both the courts and the commentators have endorsed these views as to the meaning of *Automatic Canteen.* They have uniformly held that the Commission has the burden of proof as to the actual cost differences and have drawn no distinction between the burden of going forward and the burden of persuasion in this respect. Thus, in *Rutledge* v. *Electric Hose and Rubber Co., supra,* 327 F.Supp. at 1277, the Court said:

> "There is a burden upon the complaining party to show that the price differential exceeded any cost savings the seller may have enjoyed in sales to the favored buyer."

See also Alhambra Motor Parts v. *FTC,* 309 F.2d 213, 218 (9th Cir. 1962).

C. Edwards, in *The Price Discrimination Law* (1959) at p. 512, writes:

> "Thus the Commission must prove that there are no differences in cost adequate to account for the discrimination.
>
> * * *
>
> "Moreover, it is not enough for the Commission to show that the seller's discriminations are not justified by cost. It must also show that the buyer knew or had reason to know of this lack of justification."

See also W. Patman, *Complete Guide to the Robinson-Patman Act* 157 (1963); C. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* 149 (2d rev. ed. 1959).

In the present case, the allocation of the burden of proof was not a matter of indifference since the only evidence introduced by complaint counsel bearing on lack of cost justification was wholly insufficient. Indeed, the opinion recognizes that if complaint counsel had the burden of proof, the Commission would have been compelled to reach a different result. In referring to the Malone calculations relied on by complaint counsel to show that there was no cost justification, it stated:

> "we do not believe that complaint counsel has the burden of introducing a formal study demonstrating that the price differential is not cost justified and do not consider these calculations such a study" (A1048, n.25).

Accordingly, if we are correct in our burden of proof contention, the Commission's recognition that complaint counsel failed to introduce a study "demonstrating that the price differential is not cost justified" would appear to dispose of the case.

B. The Commission Failed to Find That the Price Difference Was Without Cost Justification and Improperly Found That A&P Was Aware of a Lack of Justification.

Presumably because it placed the burden of proof as to cost justification on A&P, the Commission failed to make a finding that the price differences were, in fact, without cost justification. Instead, it found only that A&P had "the requisite knowledge that the cost justification defense [was] unavailable" (A1045) and that A&P's cost study evidence was "inadequate to shift the burden back to Com-

plaint counsel" (A1057). This failure to make the essential finding that there was no cost justification is, in itself, a fatal flaw.

This defect in the Commission's decision is highlighted by its finding repeatedly that "there were differences in the way A&P and its competitors were served" (A1034) and "many of these [competing] stores received more service than A&P" (A1045), while at the same time admitting that the only evidence adduced as to lack of cost justification (Malone's internal cost calculations) did not demonstrate such a lack (A1048, n.25) and refusing to pass on its accuracy (A1052, n.31).[39] Although the opinion does assert casually (A1045) that "the service savings to Borden could not in any way justify the price differentials (*See* I.D. 109-110 [A949-50])", the Initial Decision paragraphs to which the Commission refers rely entirely on the Malone calculations which the Commission itself refused to endorse. These calculations clearly did not take into account the cost savings which resulted to Borden from severely limited drop deliveries to A&P, and did not even attempt to compare the cost of service to A&P with service to any other customer (A1779-80, 1793, 3412-13, 3515-17, 3998-4001, 4219-20, 4274, 4277, 4280, 4291).

A further fundamental flaw in the Commission's rejection of the cost justification defense is the inadequacy of the evidence it relied on to show that A&P had reason to believe that no justification existed. This evidence consisted of six items, each of which is considered below. Preliminarily, however, we note that there was no evidence, and the Commission did not find, that:

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[39] Mr. Malone himself admitted that his rough calculations were not cost studies (A4094-98, 4274, 4280). The Commission also declined to "ascertain" whether the A&P studies offered to rebut the Malone calculations were accurate (A1052, n. 31). Actually, the determination of comparative cost of service in this case is a matter of some complexity inasmuch as virtually all of the competing stores received different and significantly greater service than A&P (see p. 67 below).

(a) A&P knew at what prices its competitors were buying. On the contrary, there was considerable evidence that in the dairy industry actual prices are not generally known and that A&P in particular was not the recipient of any prices given by Borden to A&P's competitors (A1790, 1868, 2171, 2314-15).

(b) A&P knew in what quantities its competitors were buying, or what services its competitors were receiving. There was, however, ample evidence that A&P's private label arrangement was accompanied by a sharp reduction in the services previously rendered to A&P—which reduction applied to both the private label and the branded items it bought from Borden (A1162-63, 1965, 2230-32, 3102, 3235, 3489-90, 6391-93).

Further, since much of the "evidence" relied on by the Commission consisted of statements emanating from Borden in connection with its negotiations with A&P, it should be recalled that the Supreme Court in *Automatic Canteen* recognized that a buyer is not required to accept with blind faith statements by his natural adversary:

> "We need not in this case consider the weight that can be attached to affirmative statements by the seller to the buyer that a price was or was not cost-justified, since there were no such statements in this case. See *supra*, p. 67. We need not now consider whether in an appropriate case the Commission may find it necessary to subject such statements to careful scrutiny. Thus, for instance, the Commission may consider that a seller stating that a price would be unlawful might in some situations be puffing rather than stating anything which a buyer can rely on or should be charged with." (346 U.S. at 80 n.24)

A buyer engaged in hard negotiating with a seller must and does anticipate that the seller will be prone to ex-

aggerate the value of his proposal to the buyer and at the same time will minimize the profits he is likely to make as the seller. Similarly, the seller is likely to overstate the lengths to which he is going to meet or beat competitive offers. If a buyer were bound to accept all such statements as showing a lack of cost justification, his bargaining position would be severely impaired.[40]

Turning now to the six matters relied on by the Commission to show that A&P knew that the Borden offer could not be cost justified, we deal with each Commission argument in order below.

(1) *A&P knew it was being charged different prices for branded items and for private label items* (A1045, 1049). The fact that A&P knew that its private label prices were below those it was charged for branded products does not support an inference that A&P knew what its competitors were paying or that any difference between them lacked cost justification. A&P had reason to know only that the lower cost of the limited service it was receiving on all milk products was reflected more in the private label prices than in the brand label prices. As we have seen, A&P had no access to the prices charged to others (A1867-68, 1927,

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[40] The Commission responds to this by noting that Mr. Schmidt said he had regarded the deceased Mr. Malone of Borden (who was never seen by the administrative law judge or the Commission) as "honest and forthright" (A1047, n.24). This, of course, does not mean that he thought the Borden salesmen he so described (A1929) incapable of the "puffing" to which the Supreme Court referred.

The Commission's next statement (that, if it disregarded the Malone calculations because a self-interest motive was present, it would be required to disregard A&P's cost study) makes no sense at all. The Malone calculations were objected to on far different grounds than self-interest, including lack of adequate opportunity for cross-examination (A3179-80) as well as the fact that they did not even purport to be studies of the costs of serving A&P (A4219-20, 4280, 4291). Beyond that, the issue here is not what cost studies the Commission should disregard, but what statements of the seller A&P, as a buyer, was entitled to view with skepticism in a negotiating context.

2171) and dairy prices generally varied so dramatically from any published prices that there were no "regular" prices (A1513, 2417-23, 2433, 3032-35, 3095-96, 3107-10, 3119-21). Further, there was no evidence that A&P knew what services its competitors were receiving, or the quantities in which they were buying. The mere fact that Borden's prices to A&P for branded milk (delivered under similar conditions) were higher than for private label should perhaps have made A&P suspicious that the brand label prices were too high, rather than that the private label prices were too low.

(2) *Borden told Schmidt that its final offer could be justified only on the basis of meeting competition* (A1046). Any such statement was taken as natural "salesman's talk" (A1903) or the very kind of "puffing" against which the Supreme Court cautioned.[41] It is clear beyond cavil on this record that Borden never told A&P that there was no cost justification (A1085, 1792-93, 2192-93) and made no study which would have enabled it to do so (A1779-80, 1793).

(3) *Borden did not provide A&P with a letter of availability to others on proportionately equal terms, but instead wrote that "our prices are proper under applicable law and we are prepared to defend these prices"* (A1047). It is difficult to see how Borden's letter can be construed as notice that its prices were not cost justified. Indeed, the evidence shows that this letter was not so

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[41] There was also considerable confusion in the record as to just what the Borden representatives said on the subject of meeting competition at the VFW Hall meeting (pp. 17-18 above). However, the Robinson-Patman Act was never mentioned, there was never any writing from Borden to A&P concerning meeting competition, and nothing was ever said on this subject in a manner calculated to reach Mr. Schmidt's superiors (A1089-90, 1793, 2193, 4460).

construed by either Borden or A&P but was similar or identical to others given by Borden to A&P (A1177, 4483-86) in which the phrase "prices are proper under applicable law" was interpreted by Borden in writing as covering "any implications that may be required as to availability under the Robinson-Patman Act" (A1174-78, 4484).[42]

(4) *During the negotiations, Borden gave A&P the Malone data purporting to show that Borden "would be either losing money or making a minimal profit" in selling to A&P* (A1047). The briefest analysis of this Malone data reveals why his superior, Mr. Minkler, characterized Malone's calculations as "sales tools", why the Commission was unwilling to give Malone's work a stamp of reliability, and why A&P would be suspicious of it. Mr. Malone admittedly did not take into account the savings to Borden which would result from serving A&P under limited service conditions with the cost of serving others (p. 47 above), and his figures were also replete with other errors (A445-53). In the light of this evidence, the Commission's observation that "the data may not be completely accurate" (A1047) is a gross understatement.[43]

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[42] It is doubtful whether Section 2(a) actually requires that private label prices be offered to others on proportionately equal terms. The phrase "proportionately equal" is used in Sections 2(d) and (e) of the amended Clayton Act, but is significantly absent from Section 2(a). It is well recognized that Section 2(a) is not coextensive with Section 2(d) or 2(e). See *FLM Collision Parts, Inc. v. Ford Motor Co.*, 5 Trade Reg. Rep. (1976-2 Trade Cas.) ¶ 61,103 at 70,000 n.8 (2d Cir. 1976); *Rutledge* v. *Electric Hose & Rubber Co., supra,* 327 F. Supp. at 1275; *New England Confectionary Co.,* 46 F.T.C. 1041, 1060 (1949); D. Baum, *The Robinson-Patman Act* 51 (1964).

[43] While these calculations can hardly have imposed on A&P any duty to inquire whether the prices were available to others (A1047), in fact A&P did so inquire. Mr. Schmidt was told he would receive a letter to that effect (A1899) and the Borden witnesses testified that these prices were offered to others (p. 21 above).

(5) *"A&P's trade experience should have given it reason to know that Borden's private label prices were not cost justified"* (A1048). The only finding made by the Commission as to trade experience was that "A&P was familiar with the dairy industry generally and with the Chicago area specifically", hardly anything which shows that A&P knew cost justification did not exist. In fact, the evidence of A&P's trade experience showed that A&P believed that cost justification existed. Apart from the assurances given by the Bowman offer in this regard, the A&P representatives were aware of a 2-2-2 formula (pp. 20-21 above). While not an exact measure of each dairy's costs, they relied on it as a workable rule of thumb.[44] The Commission argues that, since this formula was not based specifically on Chicago costs, "it should have been adjusted"; but this does not detract from the fact that this formula gave A&P additional reason to believe that Borden's prices were in the ballpark.[45]

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[44] A&P's brief to the Commission made this same statement (at p. 49). The Commission's opinion (at A1051) translates this into an admission that "the formula was never used to determine the exact measure of a dairy's cost". To the contrary (as A&P pointed out in its brief below), Borden's offer to A&P in New York was based precisely on the 2-2-2 formula (A3306-14).

[45] The Commission repeats here the argument previously dealt with (pp. 49-50 above) that, since A&P was receiving lower prices on private label than Borden label, and receiving the same service on both, it must have known that its competitors were receiving less favorable prices. The Commission also comments that some of A&P's competitors received limited service, and adds, in a footnote (A1048, n.26) that "the only benefit lost by A&P was advertising, which was a very small expense". Again the Commission compares A&P's purchases in private label and brand label instead of comparing A&P's purchases with the purchases made by its competitors. As we have demonstrated elsewhere (p. 47, n.39 above, p. 67 below), competing customers who were alleged to have been discriminated against received substantially greater benefits in delivery service than A&P received on its Borden or private label purchases.

(6) *"Finally, A&P's conduct after the private label agreement was consummated convinces us . . ."* (A1048-49). This is a reference to A&P's acceptance of a price increase on Borden brand label products, allegedly attributable to increased costs, while resisting an increase in the same amount on private label products. This in no way supports an inference that A&P knew that the private label prices it received were not cost justified. Instead, it was quite proper for A&P to argue that cost increases attributable to container costs (which had gone up before the private label negotiations were concluded, CX 79) and to increased labor costs (when the service received by A&P was less labor intensive than that provided generally) should not be fully passed on to it. Since A&P was receiving limited service on all products delivered to it, whether private label or Borden label, it might have been more logical for A&P to have resisted the price increase on all products. The pattern had been, however, to reflect the cost savings in the private label prices and it was, therefore, not surprising that the parties continued to operate in this framework.

* * *

In short, the evidence relied on by the Commission falls far short of a demonstration that A&P knew or had reason to know that the prices it received were not cost justified. Thus Count II must be rejected both because of that failure of proof and because of the failure of complaint counsel to prove—and of the Commission to find—that cost justification was, in fact, lacking.

III.

The Commission Improperly Rejected A&P's Cost Studies.

While A&P had no obligation to do so, it presented three cost studies at the hearing. The Illinois cost study was a comparison of the difference between the prices charged A&P and the allegedly injured Illinois customers with the difference between the costs incurred by Borden in serving A&P and those customers (A2691). Borden's marketing costs were broken down into eight subfunctions: truck-loading, physical delivery, branch clerical, product waste, branch selling, Borden label advertising, Borden label merchandising, and overhead costs (A2694, 5682-757). The second study was a study of the Indiana stores which included the same cost elements plus an additional marketing expense function for credit loss (A2817, 5758-873).

The third cost study differed from the other two in that it did not purport to determine differences between Borden's costs of serving A&P and its costs of serving other customers, but rather was an analysis of the profit to be anticipated on Borden's private label proposal. It was offered for the purpose of showing that the Malone calculations relied on by complaint counsel were wholly inaccurate. Accordingly, it was necessary to determine total costs (including basic costs common to all customers), and thus this study also included such costs as raw milk and other materials and processing, in addition to those categories of costs dealt with in the Illinois and Indiana studies (A2521-27, 5565-681).

Although over 700 pages of the proposed findings and the Initial Decision were devoted to Mr. Havemeyer's cost studies, such an exhaustive review is not possible in this brief. Fortunately, it is not necessary in order to demon-

strate that the Commission erroneously rejected those studies.[46]

A. The Commission Applied Improper Standards.

The Commission has recognized that cost justification studies (even where, unlike the instant case, they are presented by the seller itself) "ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations"; as a result, "[t]here is inherent in them a reasonable margin of allowable error", and "[w]here they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight". *Minneapolis-Honeywell Regulatory Co.,* 44 F.T.C. 351, 394 (1948). *See also Report of the Attorney General's National Committee to Study the Antitrust Laws* 175 (1955); *FTC* v. *Standard Motor Products, Inc.,* 371 F.2d 613, 622 (2d Cir. 1967); *Reid* v. *Harper & Bros.,* 235 F.2d 420, 422 (2d Cir.), *cert. denied,* 352 U.S. 952 (1956).

Application of a liberal attitude is, of course, even more appropriate where, as here, it is the buyer rather than the seller who prepares the study of the seller's costs. As the Supreme Court wrote in *Automatic Canteen Co. of America* v. *FTC, supra*:

> "Added to the considerable burden that a seller himself may have in demonstrating costs is the fact that the data not only are not in the buyer's hands but are ordinarily obtainable even by a seller only after detailed investigation of the business. A subpoena of the seller's records is not likely to be adequate. It is not a question of obtaining information in the seller's

[46] The Commission merely affirmed Judge Hinkes' finding that A&P's cost justification studies " 'are so defective and inadequate as to furnish no evidentiary basis' to justify the price differential that A&P received for private label products on the basis of Borden's cost savings" (A1052).

> hands. It is a matter of studying the seller's business afresh." (346 U.S. at 69, footnote omitted)

The Court went on to observe that "the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer" (346 U.S. at 79).

Despite the language of the Supreme Court and the facts of the instant case, the Commission held that "generally a buyer's cost justification study should meet the same standard that a seller's must" (A1052). The Commission noted that it would be "willing" to lower the standard if it were demonstrated that the buyer could not obtain the necessary records from the seller to undertake the study (A1053). Yet, contrary to the Commission's conclusion, this is precisely what occurred here. The administrative law judge rejected A&P's studies, in part, on the grounds that they were based upon only that portion of Borden's records which Borden had provided to Mr. Havemeyer (A965-66) and that Mr. Havemeyer lacked personal familiarity with Borden's operations (A970). The record also shows that A&P was hampered in preparing its cost study because of the unavailability and illegibility of Borden's records and its inability to interview Borden's employees who had knowledge of conditions in 1965-69 (A2411, 2722, 2813-14, 3036). Moreover, this is precisely a case in which access to Borden's records was not enough and, in the Supreme Court's words, "studying the seller's business afresh" was necessary. For example, Borden's records did not contain time studies or standards which would permit allocation of its delivery costs and such standards had to be derived from other data (see pp. 57-60 below).

Most of these difficulties are directly attributable to the unjustified delay by complaint counsel in completing their investigation into this matter, and by the Commission in not issuing this complaint until October 1971—six years

after the conclusion of the private label negotiations and five years after the FTC staff commenced their investigation.[47] In response, the Commission states that by February 1967, A&P was "on notice" of possible Robinson-Patman Act litigation and if A&P was "indifferent to this possibility of litigation, the Commission is not at fault" (A1063). This argument suggests that, to avoid the Commission later charging "indifference", a buyer must attempt a contemporaneous cost study of any purchases as to which Robinson-Patman Act litigation is a "possibility".[47a]

Perhaps the most egregious example of the FTC's failure to follow a liberal approach to the buyer's proof was its exclusion of Mr. Havemeyer's original computation of Borden's delivery costs because it was based in part upon "time standards" (which Mr. Havemeyer's Case and Company had developed for the performance of certain delivery functions) for which the complete underlying data were no longer available (A1053). The Case and Com-

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[47] Unjustified delay in asserting a charge, with resulting prejudice to the defense, may amount to a denial of due process requiring dismissal of the complaint. *United States* v. *Marion,* 404 U.S. 307 (1971); *United States* v. *Harmon,* 379 F. Supp. 1349 (D.N.J. 1974). The Commission's delay in instituting this proceeding also prejudiced A&P by preventing it from (a) calling as witnesses Messrs. Parmalee and Hart who reviewed and approved the Bowman proposal (A2294-97, 2311-14, 2341-42, 2360-61; pp. 6-7 above), (b) effectively cross examining Joseph Malone (Borden's accountant, whose deposition was taken shortly after the complaint was issued and who died before the hearing) (p. 6 above), and (c) establishing that the price comparisons presented by complaint counsel did not include all of the discounts, rebates and other allowances received by the allegedly injured Borden customers (A4501-22, 5179-5411, 5881-97, 6088-93; pp. 66-67 below).

[47a] Not only would such a requirement add wholly uneconomic burdens to A&P costs, but it is unrealistic to assume that a seller would disclose such highly confidential detailed information—information which has been refused A&P by Borden and others in the past, presumably because it would give A&P an advantage in bargaining (A6026).

pany time standards were compiled in the regular course of their customary business when they analyzed dairy costs in the Chicago area between 1949 and the early 1960's for purposes unrelated to this case (A2610-11, 2615). While all of the contemporaneous records kept by Case and Company which were still in existence were made available and admitted in evidence (RA&PX 153, 197; A2990-96), much of the underlying data had been destroyed when they seemed to have no further use (A2609). The time standards themselves, however, have been consistently used by Case and Company in the regular course of its business (A2610-13). We submit that, in these circumstances, the Case and Company time standards were admissible as reliable business records made and kept in the regular course of business and as test reports "testified to by a person supervising and participating in them". *Buchwalter* v. *FTC*, 235 F.2d 344, 346 (2d Cir. 1956). *See also Williams* v. *Humble Oil & Refining Co.*, 53 F.R.D. 694 (E.D. La. 1971).

Judge Hinkes compounded his error by further rejecting A&P's alternate use of time standards from an official publication of the Wisconsin Department of Agriculture (RA&PX 9, A4472-82), the purpose of which was to provide standards which dairies "could follow without getting in trouble . . . through resulting discounts" (Solverson 1578, A2085). Although this Wisconsin Manual, published only the year prior to the private label negotiations, had been coauthored by and was introduced by the Commission's own expert witness, Dr. Lyle Solverson, Judge Hinkes nevertheless rejected A&P's use of these data on the ground that these time standards "constitute insufficient basis for a determination of Borden's cost in the Chicago area for the periods of time involved in this proceeding" (A967).[48] This ruling is plainly inconsistent with the

[48] The time standards were used only to determine the time required to perform various functions involved in the delivery of milk to the retail store (*e.g.*, loading and unloading), which

Commission's representation to the Supreme Court in *Automatic Canteen Co. of America v. FTC, supra,* that "knowledge generally available to the buyer from published data or experience in the trade could be used by [a defendant buyer] to make a reasonable showing of his sellers' costs" (346 U.S. at 69).

The appropriateness of applying the time standards from the Wisconsin Manual to Borden's Chicago operations is reinforced by the results of that application. A&P's proposed findings utilizing the Wisconsin Manual time standards, Mr. Havemeyer's original cost studies using the Case and Company time standards, and a study conducted of Borden's Milwaukee, Wisconsin operations in August 1964 by the independent accounting firm of Haskins & Sells (A3201-05) *all* result in substantially the same figures for Borden's cost of providing limited service delivery to A&P.[49] Further, these costs were *all* substantially less than those assumed in the cost data relied on by complaint counsel (A3412-13, 3515-17).

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functions do not vary markedly from one place to another. Dr. Solverson himself, in the hearing below, used time standard information from the Wisconsin Manual to draw conclusions concerning the relationship between limited service delivery and full service delivery in Chicago (A2081).

Judge Hinkes also asserted that the Wisconsin Manual was received in evidence for impeachment purposes only (A967), though no such restriction on the use of the exhibit will be found in the record. On the contrary, A&P counsel explicitly disavowed any intention to so limit the use of this exhibit, RA&PX 9 (see colloquy between counsel and the administrative law judge at A3181-200). Moreover, Judge Hinkes himself stated in another context that an exhibit "having been received, it is available for any purpose in this proceeding" (A6407), a rule which should have been applied to the Wisconsin Manual.

[49] The delivery cost derived by Haskins & Sells was $.011807 per point (A3201-05). The delivery cost originally determined by Mr. Havemeyer was $.011201 per point (A5650). Those set out in A&P's proposed findings (based on the Wisconsin Manual and other data) range between $.008270 for drop delivery and $.015160 for modified drop delivery (A569). To avoid controversy A&P adopted

When Borden conducted no contemporaneous time studies, and when complaint counsel referred to none except the Wisconsin Manual, the Commission's rejection of the only time standards now available imposed an impossible burden on A&P. Both the Havemeyer time standards and the Wisconsin Manual standards were far more accurate and more reliable than the cost data approved by this Court in *Reid* v. *Harper & Bros.*, *supra*. There, the defendant, having no cost records for the relevant time period, 1941-1950, used figures for 1951 and adjusted them backwards on the basis of general salary rates. This Court held that, although such a method lacked the full measure of desired precision, it was undertaken in good faith and in accordance with minimum requirements of sound accounting principles, and, under the circumstances, was the best available procedure. This same practical approach should have obtained here.[50]

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the higher figure, although the evidence indicates that the service actually received by A&P was closer to drop delivery than modified drop delivery (A565-69).

[50] In the context of the massive quantity of data that had to be located and analyzed many years after the fact to prepare the monumental cost studies presented in this case, the Commission was hypercritical in magnifying the insignificant instances in which Mr. Havemeyer was not completely familiar with work performed by his staff (A1055). Its statement that Mr. Havemeyer's experience with Robinson-Patman Act cost studies was limited to the preparation of a study for only one other litigated case, in which the study was rejected on legal grounds because of failure to classify stores adequately (A1056), is decidedly misleading. The administrative law judge correctly found that Mr. Havemeyer's "professional career has been very largely devoted to cost accounting in the dairy industry" (A965-66) and the Commission itself stated that his classification of customers here "makes some sense and could meet the [*United States* v. *Borden Co.*, 370 U.S. 460 (1962)] test" (A1056).

The Commission's further comment that Mr. Havemeyer did not consider "many relevant factors" (A1055) relies on seven findings of fact made by Judge Hinkes which (even if accepted and considered together) are hardly material or determinative. Three of them (A972-73) concerned a study of one non-A&P store in Valparaiso, Indiana; the other four findings dealt with calculations of

B. The Commission's Other Objections to A&P's Cost Studies Are Without Merit.

The Commission also claimed that Mr. Havemeyer's studies (a) did not allocate overhead expenses according to accepted accounting principles, (b) did not consider the fact that a portion of Borden's expenses were incurred only in connection with its dealings with A&P, (c) did not allocate costs according to the manner in which they were incurred, and (d) inaccurately assigned credit loss costs to certain customers in the Hammond, Indiana study (A1054-55).

The lack of merit in this series of criticisms is exemplified by the Commission's contention that central office overhead expenses were not allocated according to accepted accounting principles. Mr. Havemeyer allocated these expenses on the basis of the percentage of branch expenses attributable to A&P and to the competing stores. The Commission, citing one of complaint counsel's proposed findings, claims that home office expenses must be allocated directly to the segments of the business to which they are related. However, Mr. William Lemberg (the Commission's own expert who testified in rebuttal to Mr. Havemeyer) agreed that Mr. Havemeyer's allocation of overhead expenses is a generally accepted and *almost universally followed* accounting procedure (A1560).

The assertion that Mr. Havemeyer did not take into account certain selling expenses allegedly attributable solely to A&P (*i.e.*, the expense of Mr. Tarr and his associates who allegedly spent a considerable amount of their time on the A&P business) overlooks the fact that Mr. Havemeyer took Borden's selling efforts to A&P into account by his allocation of central office overhead to A&P and the other Borden customers. Mr. Lemberg acknowledged

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rental costs of a particular milk filling machine, trailer loading expense pertaining to glass gallons, the treatment of truck loading expense and the cost of product waste.

that a portion of the salaries paid to Mr. Tarr and his associates was thus allocated to A&P (A1558). He added that it would have been "preferable" to have conducted a time study to determine how they spent their time but that such a time study "would not be practicable in a case like this" (A1559-60). Without such a time study, there was no way to know how the sales personnel divided their time among existing or prospective customers.[51]

The Commission's claim that the studies do not allocate costs in the manner in which they were incurred cites complaint counsel's proposed findings as to truck or automotive expenses and drivers' commissions, which they alleged should be allocated on a volume rather than a time basis as was done by Mr. Havemeyer. But an allocation of transportation expenses on the basis of volume is no less arbitrary than a time allocation; Mr. Lemberg admitted that such variables as mileage and operating costs (insurance, licenses, taxes) have virtually no correlation with volume transported (A1537-41). He also stated that in many situations, it would be permissible (even preferable) to allocate truck expenses on a time basis (A1543-48).

With regard to drivers' commissions, complaint counsel urged that, since they were paid on a per point basis, they cannot be allocated among customers on the basis of time (required to deliver to each customer) but must be allocated equally among all customers. The commission, however, is part of the driver's compensation package and

[51] The Commission also claims that certain clerical expenses (in connection with central billing) were incurred only in connection with A&P's business. This criticism is at best trivial. The average spread between the clerical cost charged to A&P and that charged to the other customers is on the order of magnitude of $.002 or $.003 per point, and in no case is it greater than $.0046 (A5682-757). That these differences are not overstated is strongly evidenced by the fact that they are far below the 2% discount allowed by Borden to those of its customers who, like A&P, received central billing (A1420, 3119).

is no more than a mechanism for arriving at a desired pay level for drivers (A3063-64). Time is a critical factor and, hence, serves as a logical basis for the allocation of all such compensation. The driver is not really a salesman but is essentially an order taker and it is appropriate that his compensation be allocated on a time basis (A3065-68). As to this, Mr. Lemberg again agreed (A1533-35).[52]

The Commission's final criticism of the specific allocations used in the Hammond study is that the credit loss expenses should not be allocated to customers who have not contributed to this expense. However, once it can be shown that certain customers are properly within a class (based upon the fact that they enjoy a specific service) as A&P demonstrated as to all the allegedly injured customers receiving credit from Borden, the cost allocation need only be as accurate as is practicable. The only viable method of allocating the credit costs in Indiana was on a per unit or volume basis as Mr. Havemeyer did in his analysis.[53]

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In considering these cost studies, it should be remembered that A&P showed an "over-justification" of Borden's prices to A&P in Illinois ranging from a low of $.010648

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[52] Several state milk regulatory authorities also take the view that it is appropriate to allocate milk drivers' commissions on a time basis (see A5918, 5951, 5985-86). Indeed, a bulletin of the Wisconsin Dept. of Agriculture, entitled "Allocation of Wholesale Milk Distribution Costs" (A4472-82) authored by the Commission's own expert on the allocation of wholesale milk distribution costs, Dr. Lyle Solverson (A4473), stated that drivers' commissions are to be allocated on a time basis (A4476-78).

[53] Complaint counsel also attacked A&P's cost studies as involving improper averaging. Since the Commission concluded that A&P's approach "makes some sense and could meet the [*United States* v. *Borden Co.*, 370 U.S. 460 (1962)] test" (A1056), we think it unnecessary to deal with that issue here.

per point (in the comparison of A&P's purchases with Bruno Nalepa's; A703-34) to a high of $.052104 (in the comparison with Bill's Market #2; A703-34). Thus Borden's prices to A&P would be cost justified *vis-a-vis* its prices to each of the allegedly injured customers in Illinois even if, for example, the physical delivery cost differences derived by A&P overstated the differences between A&P and the other customers by 100% (see A637, 735-38). This significant over-justification puts in perspective the Commission's sniping at the details of Mr. Havemeyer's cost determinations and its application of such severe standards in rejecting them.

IV.

The Evidence That A&P Was the Beneficiary of a Price Discrimination Lacks Probative Value.

Commission Exhibit 183A-B (A3673-74) purports to set out the dollar amount of sales and alleged rebates, and the resulting percentage "discount rates" (calculated by dividing the alleged rebates by the sales) to 24 non-A&P customers on Borden's O'Hare route in the Chicago Metropolitan area during February 1966. Similar data is presented on CX 183C-D (A3675-76) for 28 non-A&P customers during March 1966. The "discount rates" so calculated are compared with the "percentage discount" A&P received from Borden on its purchases of private label products during these same months. These comparisons of February and March 1966 prices constitute the *sole* "evidence" of the alleged "discrimination" in Illinois.

The major defect with CX 183 is that it compares apples with oranges. The discount rate shown for the non-A&P customers is calculated on *all of their purchases from Borden taken together* (A1265-66, 1281). The percentage discount shown for A&P, on the other hand, is confined to a

discount which A&P received on its purchases of *private label* items only at a time when it was purchasing substantial amounts of the same products at higher prices in brand label packages (A1281-340). Thus, the percentage discount on only the highest discount items among A&P's purchases are compared with the discounts on the total purchases by Borden's other customers of these 11 items (in Borden's brand label) and everything else those customers bought from Borden.[54] It is evident that this comparison is loaded against A&P and invalid.

Complaint counsel's only other evidence of discrimination was a set of exhibits which purported to compare the net prices paid by A&P with what purport to be net prices paid by five other Borden customers in Indiana during the periods October, 1966 through March, 1967 and June, 1969 through March, 1970 (CX 188, 191, 194-98, 200 and 202; A3679-997). According to Commission accountant John Bitting, who prepared these exhibits, they compare the prices paid by each of the non-A&P Indiana customers for "common items" with the prices these customers would have paid had they been charged the same prices as A&P paid for private label (A1183). The term "common item" was redefined during the course of the hearing (A1206), so that for these Indiana customers it was limited to items purchased by the non-A&P customers which were also purchased by an A&P store under private label (A1210-11).

While the Indiana exhibits at least avoid making the utterly meaningless comparison presented by complaint

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[54] This omission of Borden label items is significant since the dollar value of A&P's purchase of Borden label items at the time was *greater* than the dollar value of its purchases of private label products (A1280, 5695, line 8, cols. 1-3). In February and March, 1966 from 38.6 to 41.3% of A&P's purchases even of those items covered by the private label program were purchased by A&P under the Borden label (A1278-79, 3677).

counsel for Illinois in CX 183, they are, nevertheless, defective because they do not compare all of the allegedly injured customers' dairy purchases from Borden with all of A&P's purchases. Dairy products are sold as a line of commodities and a retailer is interested, not in the profits he can earn on a particular item (*e.g.*, half-and-half), but the profit he can earn on the line as a whole. Thus, the exclusion from consideration of items not purchased by A&P in private label is both unrealistic and prejudicial to A&P. Not only did A&P pay more for those items, but complaint counsel's own exhibits reveal that, even in the period June 1969-March 1970, the percentage of non-common milk and dairy items purchased by the allegedly injured customers amounted to a substantial portion of their total purchases.[55]

Further, the alleged "discounts" to non-A&P customers in both Illinois and Indiana were derived by merely taking into account readily-ascertainable rebates as shown in the route books of the Borden drivers or on invoices (A1337-39). In addition, the testimony of these non-A&P customers showed that their discounts were not applied equally to all purchases (A1351-52, 1513-14, 1834, 4364-86), and at least some of them received price allowances that were not made available to A&P (A1361, 1503-05, 1513). The Commission's expert witness could not say whether these or other allowances or rebates were taken into account in figuring the "net prices" and resulting "discounts" to non-A&P customers (A1337).

Similarly, the rebate checks relied upon by the Commission accountant in compiling the Indiana exhibits were proven to be incomplete (see A454-62). While the adminis-

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[55] For example, in this period, almost 24% of Burger's purchases were of non-common items (A3680); the percentage for Model Food Center was 21% (A3719), for Wallies Market 11% (A3930), and for Wilco Food Center 25% (A3960).

trative law judge argued that the amount of rebates and other discounts *demonstrably* overlooked by the Commission staff in preparing these exhibits were small in comparison with the total amount of discrimination allegedly suffered by the Indiana customers (A954-55), this finding misses the point. A&P's showing, with some difficulty years after the fact, that additional rebate payments were made by Borden to its allegedly injured customers proves that Borden either failed to provide complaint counsel with all rebate information necessary to calculate those customers' net prices or, if it was supplied, it was lost or otherwise overlooked. In either case, complaint counsel have not met their burden of establishing the accuracy and completeness of the exhibits on which they rely.

Moreover, none of the allegedly injured customers received Borden's products under the same Spartan delivery conditions as A&P. In Illinois, for example, the uncontradicted testimony was that all of the allegedly injured customers for whom complaint counsel presented evidence of price discrimination (A3673-76) received full service delivery (A3103, 5414, 5717). All of Borden's allegedly injured customers in Indiana, except Wilco, also enjoyed full service—and even Wilco continued to receive services not provided for A&P, including merchandising, branch selling, advertising support and extension of credit (see A638, 771-78). Thus we have conclusive proof that these price comparisons are invalid.

In rejecting A&P's contention that complaint counsel's price comparisons were defective because they did not include A&P's brand label purchases from Borden, the Commission cited the *Beatrice-Kroger* case, *supra,* to the effect that injury to secondary line competition must be analyzed on a "location by location basis". Here (unlike the situation in that case) the Borden brand products were sold by the same A&P stores which sold the private

label products, so that any effect on competition with A&P stores must be measured by comparing the aggregate Borden price to A&P with the aggregate Borden price to others. As the hearing examiner pointed out in the *Beatrice* case, the "total advantage" which Kroger gained from its arrangement with Beatrice "was substantially lessened or reduced because Kroger was required to pay the list price to Beatrice for Beatrice's branded milk" and

> "we are compelled to conclude that realism, fairness, and simple justice require the discriminations in this proceeding to be determined by comparing the average unit price [which] Kroger paid to Beatrice with the average unit price Beatrice charged Kroger's competitors for an equal amount of milk of like grade and quality." *Beatrice Foods Co., supra,* 76 F.T.C. at 754 (Initial Decision).

The finding of injury to competition on review of the *Beatrice* case does not diminish the soundness of the hearing examiner's approach as applied to our facts. In finding that discrimination had been shown, both the Commission and the Court relied heavily on the fact that Beatrice label products were sold in only 11 of 44 Kroger stores, while the others took only private label products from Beatrice (76 F.T.C. at 805; 438 F.2d at 1379). As the Commission observed, in stores which carried only the private label products (unlike any stores in the present case) "the full competitive impact of the differentials [in price] . . . would . . . be undiminished by sales of Beatrice brand products" (76 F.T.C. at 805).[56] The Court of

[56] The Commission also relied on the fact that "Kroger's entire purpose in contracting for private label dairy products was to obtain an overall advantage over its competitors" and that "Kroger merchandised its private label milk in a significantly different manner than it merchandized the vendor labeled milk" (76 F.T.C. at 806). There was no such evidence here. On the contrary, A&P sold its private label milk at the same price as Borden brand milk (A2220).

Appeals also placed considerable emphasis on this fact; *see Kroger Co. v. FTC, supra,* 438 F.2d at 1379.

In *Moog Industries, Inc.* v. *FTC,* 238 F.2d 43 (8th Cir. 1956), *aff'd,* 355 U.S. 411 (1958), the respondent priced and sold automobile replacement parts in three basic lines, each of which included a number of items. The Commission, in assessing the injury to secondary line competition caused by respondent's price discrimination among various customers, compared the net prices charged to competing distributors for each line of products rather than for each item. The Court sustained this approach.[57]

Here, too, the marketing methods used in the sale of dairy products require that all products in the Borden line sold to A&P and its competitors be used in establishing the price discriminations allegedly suffered by Borden's other customers, since A&P and the others each sold all such products side by side and at the same prices.[58]

As we have seen, complaint counsel's price comparisons are also deficient because they ignore services and indirect price concessions given to the allegedly injured customers. As one commentator has written: "a variety of collateral contract terms can so affect a seller's nominal prices as

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[57] *See also Best & Co.,* 72 F.T.C. 422, 508-13 (1967); *Joseph A. Kaplan & Sons, Inc.,* 63 F.T.C. 1308, 1348 (1963), *aff'd,* 121 U.S. App. D.C. 1, 347 F.2d 785 (1965); *Lombino & Sons, Inc.* v. *Standard Fruit & Steamship Co.,* 1975-2 Trade Cas. ¶ 60,527 (S.D.N.Y. 1975); *cf. Sylvania Electric Products, Inc.,* 51 F.T.C. 282, 285 (1954).

[58] The administrative law judge was also in error in finding that "[f]rom October 1966 on, [A&P] purchased little or no Borden label milk products, so that it enjoyed a preferential price on all its milk purchases." (A957-58). Even when A&P was buying all products included in the private label program under the A&P label it continued to purchase the rest of Borden's dairy product line in Borden label. The amount paid for these other products was about $1,400,000 out of total purchases of some $5,000,000 in Borden's Zone 1, or about 40% of the amount paid for private label products (A5105).

to create 'indirect' price discriminations" (Rowe, *supra,* at 103). Among the features which have been found to amount to indirect price discriminations are sales return privileges, delivery terms, and "the entire range of commercial accommodations or benefits extended by suppliers to customers" (Rowe, *supra,* at 103 and cases cited therein).

Guyott Co. v. *Texaco, Inc.,* 261 F. Supp. 942 (D.Conn. 1966) held that although the price charged plaintiff was on its face less than that charged to a competitor, since the price to the competitor included delivery (the cost of which was greater than the price differential), price discrimination was shown. The court quoted Representative Patman:

> " 'In order properly to compare two or more transactions of a seller with two or more of his customers, for the purpose of determining whether discrimination is involved, the prices must be reduced to a common denominator. . . .' Patman, Complete Guide to the Robinson Patman Act 14 (1963)." (261 F.Supp. at 949)

Similarly, the fact that Borden may have charged more to other buyers who received more services does not show a prohibited discrimination.

In *United Fruit Co.,* 82 F.T.C. 53 (1973), *rev'd on other grounds sub nom. Harbor Banana Distributors, Inc.* v. *FTC,* 499 F.2d 395 (5th Cir. 1974), the Commission found that direct delivery to the purchaser (resulting in a saving to it) constituted a price discrimination within the meaning of Section 2(a). As the Commission said:

> "On the particular facts of this case, United's direct delivery service to Harbor was so integrally related to and hence virtually a part of the terms of the original sale of bananas as to render it susceptible to be viewed as an indirect price discrimination to be governed by the provisions of Section 2(a)." (82 F.T.C. at 132-33)

Here, Borden's minimum delivery service to A&P was an integral part of its sale package to A&P, and was in fact the central feature of the arrangement. Accordingly, complaint counsel's simplistic comparison of A&P's prices with the prices of others who received full delivery service, or in any event more services than A&P, does not meet their burden of showing a net price discrimination.

Commission counsel's failure to make proper comparisons of the net prices paid by A&P and others for their entire line of dairy products also points up their failure to prove injury to competition—another essential element of their case. The testimony of the allegedly disfavored competitors indicates that economically meaningful price comparisons would show that there was no discrimination having an adverse impact on competition. They stated that their sales and profits grew during the relevant period (1965-1970) and that, if they wished, they could have obtained milk at lower prices from other suppliers (A1106, 1126-30, 1135-41, 1376-77, 1379, 1384-85, 1452-53, 1471-74, 1503-05, 1515-16, 1585-88, 1592, 1594, 1607). In addition, many of them specifically testified that they were not adversely affected by competition from A&P (A1106, 1361, 1382-83, 1475, 1517). The fact is that while their sales were increasing *(ibid.)*, A&P's dairy sales and overall sales declined (A1152, 1869, 1872).[59]

[59] In an effort to bolster its finding of competitive injury, the Commission's opinion asserts that "the profit margins of the unfavored customers were very low, ranging from less than 1% to 5%" (A1036, n.15). Low profit margins are true of the retail grocery business generally (A1037) and A&P's profits were even lower or non-existent (A4595). However, these margins are no indication of the much larger margins that were realized on sales of dairy products (A2305-10).

V.

The Record Does Not Establish That A&P Received An Illegally Discriminatory Price "In Commerce" On Its Illinois Purchases, or That the Allegedly Injured Indiana Customers Were Representative.

A. The Illinois Sales Were Not "In Commerce".

The Robinson-Patman Act forbids discriminatory pricing arrangements "where either or any of the purchases involved in such discrimination are in commerce", 15 U.S.C. § 13(a) (1970). Therefore, if Robinson-Patman jurisdiction is to be invoked, it must be established that either the A&P purchase or the purchase by the person allegedly discriminated against was "in commerce". This is a stricter requirement than that generally imposed under the other antitrust laws. *E.g., Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186, 199, 201 (1974), where the Supreme Court noted with approval that:

> "With almost perfect consistency, the courts of appeals have read the language requiring that 'either or any of the purchases involved in such discrimination [be] in commerce' to mean that § 2(a) applies only where ' "at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line" '." *Id.* at 200.

Accord, Bowen v. *New York News, Inc.,* 522 F.2d 1242, 1246 n.2 (2d Cir. 1975).[60]

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[60] *See also Foremost Dairies, Inc.* v. *FTC,* 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965); *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951); *Bacon* v. *Texaco, Inc.,* 503 F.2d 946 (5th Cir. 1974), *cert. denied,* 420 U.S. 1005 (1975); *Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.,* 486 F.2d 763 (7th Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974); *Belliston* v. *Texaco, Inc.,* 455 F.2d 175 (10th Cir.), *cert. denied,* 408 U.S. 928 (*Douglas,* J., dissenting), *rehearing denied,* 409 U.S. 1001 (1972); *Borden*

The Commission found Robinson-Patman Act jurisdiction with respect to A&P's Illinois purchases because (i) the milk sold to A&P was in the flow of commerce since Borden's Woodstock, Illinois dairy supplied substantially all of the private label milk and dairy products sold to A&P and approximately 60% of the raw milk used by this dairy came from Wisconsin, and (ii) the negotiations leading up to the A&P-Borden agreement were multi-state in nature and therefore "in commerce" (A1031-32).

Satisfying the flow of commerce requirement is not enough to support the exercise of Robinson-Patman Act jurisdiction; it must be shown that one of the two purchases involved in the discrimination actually crossed a state line. *Red Apple Supermarkets, Inc.* v. *Deltown Foods, Inc.*, 5 Trade Reg. Rep. (1976-2 Trade Cas.) ¶ 61,109 (S.D.N.Y. 1976).[61] The Supreme Court in *Gulf Oil Corp.* v. *Copp Paving Co., supra,* quoted from *Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir.), *cert. denied,* 396 U.S. 901 (1969), which held that Robinson-Patman jurisdiction did not exist with respect to intrastate sales of liquor in Florida even though it was clear that, prior to the sale, the liquor had moved in interstate commerce and that it had undergone no processing in Florida.

In any event, we submit that the processing of the raw milk at Borden's Woodstock plant was sufficient to break the flow of commerce because this milk was purchased by Borden in Illinois from an independent milk dealers as-

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Co. v. *FTC,* 339 F.2d 953 (7th Cir. 1964); *Jones* v. *Metzger Dairies, Inc.,* 334 F.2d 919 (5th Cir. 1964); *Willard Dairy Corp.* v. *National Dairy Prods. Corp.,* 309 F.2d 943 (6th Cir. 1962), *cert. denied,* 373 U.S. 934 (1963).

[61] The district court in *Red Apple, supra,* further noted that "[p]laintiff has failed to cite a single opinion by the Second Circuit that approves the stream of commerce analysis in Robinson-Patman Act cases" (5 Trade Reg. Rep. at 70,028 n.3).

sociation (A47, 58)[62] and because pasteurized, homogenized milk to which Vitamin D has been added is a product biologically, chemically and physically different from raw milk (see A463-77).[63] The remaining milk "by-products" that were also supplied to A&P under the private label agreement from Borden's Woodstock plant (*i.e.*, fortified skim milk, 2% milk, buttermilk, chocolate milk, half-and-half, whipping cream, eggnog, onion dip and sour cream) are also clearly different from raw milk, as the district court held in *Red Apple Supermarkets, Inc.* v. *Deltown Foods, Inc., supra.* That case involved "Light n' Lively", a form of low fat milk similar to the 2% milk involved in the instant case. The district court concluded that the "complex processing of the raw material" (as a result of which "a significant physical change has been made within the New York processing plants") interrupted the stream of commerce—even if such analysis "can be said to have continuing validity after the narrow construction given the [Robinson-Patman] Act in the *Copp Paving* line of cases" (5 Trade Reg. Rep. at 70,028-70,029).

There remains the Commission's alternate contention that the Illinois sales are subject to Robinson-Patman Act jurisdiction because the negotiations were multistate in nature and "A&P would not accept an offer to supply only a portion of its stores in Illinois and Indiana" (A1032). In effect, the Commission is saying that jurisdiction exists because private label sales were also made to Indiana. But intrastate sales to A&P stores in Illinois cannot be made into "purchases . . . in commerce" merely because other

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[62] The fact that a seller has not itself brought the raw product across state lines will defeat Robinson-Patman Act jurisdiction. *Belliston* v. *Texaco, Inc., supra,* 455 F.2d at 178-79; *Hiram Walker, Inc.* v. *A & S Tropical, Inc., supra; Red Apple Supermarkets, Inc.* v. *Deltown Foods, Inc., supra.*

[63] *Contra, Glowacki* v. *Borden, Inc.,* 5 Trade Reg. Rep. (1976-2 Trade Cas.) ¶ 61,122 (N.D.Ill. 1976).

Borden sales to A&P were in commerce. In *Mayer Paving, supra,* the Seventh Circuit ruled that the alleged discriminatory sales in Illinois did not fall within the purview of the Robinson-Patman Act merely because the defendant also made sales to Indiana customers:

> "In the case of the secondary-line [buyer] injury of the present type, we are persuaded that the interstate character of General Dynamics' overall business is not a controlling factor any more than it was in *Borden* [*Borden Co.* v. *FTC, supra*]." 486 F.2d at 769.

That case reflects the well-settled rule that, in determining whether the jurisdictional requirement has been met in a Section 2 case where only secondary-line injury is charged, the applicable test is different from, and more stringent than, the test where primary-line injury is claimed. *See* Commissioner Elman's dissenting opinion in *Borden Co.,* [1963-67 Transfer Binder] Trade Reg. Rep. ¶ 16,776 (FTC), which was endorsed by the Court of Appeals in its reversal of the Commission's decision, 339 F.2d 953 (7th Cir. 1964). See also *Foremost Dairies, Inc.* v. *FTC, supra; Miles* v. *Coca-Cola Bottling Co.,* 1973-2 Trade Cas. ¶ 74,675 (E.D. Wis. 1973).

Here, we do not even have a firm long-term contract covering both interstate and intrastate sales. Rather, we have a terminable-at-will arrangement under which some sales were made to Illinois stores and some sales were made to Indiana stores (A1482-83, 3091-92). It is also clear that Borden separately delivered the milk and dairy products from its Woodstock plant to stores in Illinois through its O'Hare Branch and to stores in Indiana through its Hammond Branch (A1611-12). Accordingly, we submit that the intrastate nature of A&P's purchases from Borden in Illinois is not affected by the facts that Borden also made interstate sales to A&P in Indiana, or that both types of sales resulted from negotiations carried on concurrently. To aggregate all of A&P's purchases so as to draw the

intrastate sales, which were the great preponderance of the total sales, under the Robinson-Patman Act, would surely be to allow the tail to wag the dog.[64]

If Illinois sales were not "in commerce", complaint counsel's evidence of discriminatory prices relates only to five customers operating nine stores in Indiana. As we will see below, evidence based on so small a group of stores is insufficient to provide the kind of representative sampling necessary to support an order.

B. There Was No Showing That the Allegedly Injured Competitors in Indiana Were Representative.

The Commission asserts that it is "unclear as to what A&P means when it argues that the sample of stores must be 'representative' ", asserting that discrimination in "only one area is sufficient" to establish a violation of law and, unless miniscule, "the portion of the market . . . affected by the . . . discriminatory prices is immaterial" (A1034). Assuming the validity of both of the Commission's assertions, it is nevertheless crucial to a showing of the requisite effect on competition that the stores selected by complaint counsel provide a representative comparison sufficient to show the prohibited discrimination in at least a "portion of the market".[65]

Evidence based on nine stores seems wholly insufficient to support an order affecting thousands of A&P stores, in

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[64] The reasoning of the Initial Decision in *Beatrice Foods Co.*, 76 F.T.C. 719, 747 (1969), relied on by the Commission, even if sound, is inapplicable here. In that case, the hearing examiner argued that all of the sales were subject to the Robinson-Patman Act because the price with respect to all sales was set by means of a formula, one of the elements of which was certain costs associated with interstate sales.

[65] We have already seen (in Point IV) that the record does not support a finding of discrimination insofar as these five Indiana customers are concerned.

competition with a much larger number of other stores, without at least some showing that the stores allegedly discriminated against were a representative sampling. It cannot be the rule that evidence relating to a few stores, however aberrational, will suffice.[66] Yet there is no evidence in the record to indicate that the competitors of A&P in Indiana that were selected by complaint counsel were typical and fairly representative; indeed, although complaint counsel were requested to state how or why these particular competitors were chosen, it was never explained.[67]

In *Frank G. Shattuck Co.*, 65 F.T.C. 315 (1964), the Commission dismissed a price discrimination complaint where counsel introduced evidence concerning the net profit margins of only two disfavored buyers "whose profits are somewhat divergent" as it found that "there is little upon which to project the probable effects of a discrimination" (65 F.T.C. at 360). The profits earned by the Indiana stores selected by complaint counsel varied throughout the period 1965-71 from a low of 0.7% to a high of 4.6% (A6118, 6287-87A, 6305, 6310). This divergence and the lack of any consistent pattern indicates that this sample is inade-

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[66] *See Admiral Corp.*, 67 F.T.C. 375, 426 (1965) (sample used in measuring price discrimination must be "typical and fairly representative"). While the *Admiral* case involved a sampling of invoices, not a sampling of stores, the same reasoning would suggest that a store sample must also be "typical and fairly representative".

[67] At the first prehearing conference in this proceeding, complaint counsel admitted that the basis for the selection of the non-A&P customers of Borden was not that they were representative or a fair sampling but the "availability of the records" and, with regard to customers in Indiana, "the commerce question came into our mind . . ." (A3176). Complaint counsel also stated at this conference: "How particular customers were selected, this was the investigative process of Mr. Palewicz [an attorney with the FTC Regional Office in Chicago] and not mine and I do not know how he obtained the names of various customers" (A3177).

quate to prove that there was, in fact, a sufficient adverse effect on competition to support this order.

VI.

The Order of the Commission Was, In Any Event, Unnecessary and Unduly Broad.

Even if it had been properly found that A&P violated the Robinson-Patman Act by reason of the activities of its unsophisticated Chicago buyer eleven years ago, the Commission's order is inappropriate—particularly at this time.

During the intervening years, there have been substantial changes in the business dealings between A&P and Borden and in A&P's own activities. A&P voluntarily terminated its dealings with Borden in Chicago almost five years ago.[68] As a matter of company policy, A&P has generally not permitted a supplier to "rebid" (A1024, 1082-83, 1155-56, 1970), and it has not accepted bids on a meeting competition basis (A6031). Further, prior to any complaint herein A&P advised the trade generally of its policy on "meeting competition" offers and on the need for assurances that the price offered is in fact being offered to competing customers (A4569-94, 4700-09, 6021, 6031). A&P has also centralized all of its dairy purchases to achieve greater supervision and control and thereby avoid some of the problems inherent in the prior system of field buying (A2395-98, 3125-26).[69]

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[68] Good faith discontinuance of a challenged practice has been held, in numerous cases, to warrant dismissal of the complaint. *Jacoby-Bender, Inc.*, [1963-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,196 (FTC 1965); *United States Rubber Co.*, 66 F.T.C. 387 (1964); *Oneida Ltd.*, 55 F.T.C. 1669 (1959); *Argus Cameras, Inc.*, 51 F.T.C. 405 (1954).

[69] Moreover, in the last two years, there have been substantial changes in A&P's management; it has a new Chairman and Chief

Both the Commission and the Courts have recognized that a case may become so "stale", or the relief sought so outmoded by changed circumstances, that the complaint should be reconsidered and dismissed as no longer in the public interest. Thus, in *Columbia Broadcasting System, Inc.* v. *FTC,* 414 F.2d 974 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970), the Court ruled as follows:

> "Much of the evidence in the record pertains to the years 1960 and 1961. The Commission did not hand down its opinion until July of 1967. We are of the opinion that because of the long delay in deciding this case and the substantial allegations of changes in the structure of the entire industry, and especially the [record] club market, this case must be remanded to the Commission for further evidence as to the present structure of the record club market in order to determine whether supplies of records have been foreclosed from other clubs and whether such foreclosures has significantly prevented new entrants into the market." (414 F.2d at 982)

See also American Bakeries Co., 68 F.T.C. 8 (1965), dismissing a Robinson-Patman complaint, timely filed in 1960 alleging violations occurring in 1959, because there was no "public interest" in continuing a case which had not gone to trial five years later; *Purex Corp. Ltd.,* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 20,370 (FTC 1973), withdrawing a complaint because of significant changes in the activities and programs of the respondent; *Harney County Land Development Corp.,* 71 F.T.C. 12 (1967); *Great Southwestern Land Co.,* 73 F.T.C. 440 (1968).

The Commission rejected A&P's contention that this case was stale on the ground that A&P did not terminate its

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Executive Officer, a new President, and a new General Counsel—each of whom was previously with another company (A&P 1974 Annual Report; *Wall Street Journal,* May 20, 1975, at p. 20).

relationship with Borden until February 1972, four months after the issuance of the complaint. While in fact A&P's negotiations with other dairies for a change in suppliers began in April of 1971 and preceded notice of the proposed complaint in June of 1971 (A2265-79, 4569-94, 6004-30), the good faith termination of an illegal practice may make an order unnecessary even when the discontinuance of the practice follows the bringing of suit. *E.g., Tung-Sol Electric Inc.*, 63 F.T.C. 632, 644-57 (Initial Decision), 63 F.T.C. 658 (Final Order) (1963); *Firestone Tire & Rubber Co.*, 55 F.T.C. 1909 (1959). The question is whether the discontinuance was, in fact, in good faith; the evidence here demonstrates that it was.[70]

The Commission also rejected A&P's claim that " 'it is impossible to infer that, unless an order is entered, A&P will hereafter engage in the conduct alleged in the Complaint' " with the comment that "[i]f merchandising methods now being relied upon by A&P to increase revenues fail, A&P might very well again feel the need to pressure small dairies to give A&P an unlawful discount and thereby increase its gross profits" (A1068). Apart from the fact that Borden was at all relevant times in a far stronger financial and competitive position than A&P, and can hardly be considered a "small dairy", and passing over the rather simplistic notion that business misfortunes make illegal activities necessary or more probable, the Commission appears to be seeking some sort of an absolute "guarantee" that illegal conduct will not occur in the future. The proper test, however, is whether illegal conduct may *reasonably* be expected to occur. *National*

[70] Unlike *Fedders Corp.* v. *FTC*, 529 F.2d 1398 (2d Cir. 1976), where the administrative law judge found that the discontinuance of the unlawful acts was not "voluntary" but a result of respondent's awareness of the Commission's investigation, the record here clearly indicates that A&P's discontinuance of its private label agreement with Borden was solely due to A&P's receipt of better prices from two of Borden's competitors (A2265-79, 4451-59, 4569-92).

Lead Co. v. *FTC,* 227 F.2d 825, 830-40 (7th Cir. 1955), *rev'd on other grounds,* 352 U.S. 419 (1957). The Commission has no authority to enter a cease and desist order as to discontinued practices where there is no reason to suspect renewal. *FTC* v. *Civil Service Training Bureau, Inc.,* 79 F.2d 113 (6th Cir. 1935).

In *R. H. Macy & Co.* v. *FTC,* 326 F.2d 445, 450 (2d Cir. 1964), this Court held that a broad order was not justified when the respondent's conduct—inducing suppliers to make promotional allowances forbidden by Section 2(d)—was, *inter alia,* "by no means a brazen violation" and nothing in the record suggested that respondent intended to resume any related activity. In view of the discontinuance of the A&P-Borden relationship, the staleness of the record, the narrow focus of the alleged violation,[71] and the important changes in A&P's policies, practices and management, there is no reason to expect that there will be an illegal practice in the future, even assuming there had been one in the past. All these circumstances, combined with no showing of any other private label arrangement by A&P which can be criticized, require that no order be entered and the complaint dismissed.

There is, in any event, no justification for the order entered by the Commission—which includes a requirement that in the future A&P has the burden of going forward with the meeting competition defense.[72] The impropriety

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[71] The Initial Decision emphasized the local focus of any violation here:

> "It was A&P's Chicago Unit which was involved in the private label agreement with Borden here at issue. And although A&P Headquarters in New York gave final approval to that private label agreement, and reviewed the reliability of the supplier chosen (Smith, Tr. 1347 [A1951]), the private label negotiations themselves were handled primarily at the Unit level (Smith Tr. 1355-1356 [A1959-60]; Archer, Tr. 1232-1233 [A6387-88])." (A921)

[72] The relevant portion of the Order states:

> ". . . provided, however, that this prohibition shall not apply . . . *if A&P can show* that said price was granted to it by the supplier to meet a competitor's equally low price. . .". (A1019, emphasis added)

of any such shifting of the burden was made clear in *Automatic Canteen Co. of America* v. *FTC, supra.* In *Federated Nationwide Wholesalers Service* v. *FTC,* 398 F.2d 253 (2d Cir. 1968), this Court specifically held such shifting of the burden to be improper, stating "in no event is the Commission warranted in decreeing what in effect is clearly a shifting of the burden of proof from itself to the petitioners" (398 F.2d at 260).

The reasons offered by the Commission to justify its shifting of this burden are unpersuasive. It stated that such a requirement was consistent with the comment in *Automatic Canteen* that "[e]vidence . . . that the seller's price was made to meet a competing seller's offer to a buyer . . . *might be* available to a buyer more readily even than to a seller." (346 U.S. at 79 n.23). But this "might be" is not true in all circumstances, and the Supreme Court never said it would be. In this very case the Commission's opinion recognized: "a seller's good faith meeting competition defense under the Robinson-Patman Act is dependent on some factors that are more readily available to him than to the buyer" (A1028, n.7). To take another example, the defense is available when a lower price is granted by a seller to its buyer in order to meet an equally low price offered by the seller's competitor to a competitor of the buyer. *Bargain Car Wash, Inc.* v. *Standard Oil Co.,* 466 F.2d 1163 (7th Cir. 1972); *see also FTC* v. *Sun Oil Co.,* 371 U.S. 505, 512 n.7 (1963). Clearly, in such situations, the Commission is in a far better position than a respondent to obtain the necessary evidence pertaining to the meeting competition defense. As the Supreme Court stated in *Automatic Canteen,* in referring to the cost justification defense, "[c]ertainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer" (346 U.S. at 79).[73]

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[73] To further justify the shifting of the burden of proof on the meeting competition defense, the Commission states: "A&P knew

There is, also, no justification for the nationwide order entered by the Commission. In *National Dairy Products Corp.* v. *FTC,* 412 F.2d 605 (7th Cir. 1969), the hearing examiner limited the order to the product line of the single division found to have made unlawful discriminations in price. The Commission there upheld this limitation, stressing that the respondent's other divisions were not involved in the alleged discrimination. Here, too, the evidence does not show that any A&P officer or employee at the Division level or above was "guilty" of even the innocuous conduct alleged in the complaint.[74]

The Commission may not impose a remedy that bears no reasonable relationship to the unlawful practices found to exist. *FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385 (1959); *FTC* v. *National Lead Co.,* 352 U.S. 419 (1957); *ITT Continental Baking Co.* v. *FTC,* 532 F.2d 207 (2d Cir. 1976); *Fedders Corp.* v. *FTC, supra.* In an analogous situation, this Court held that a Commission order that was applicable to all of the customers of a drug company found guilty of illegal price discrimination was an abuse of discretion since the order should only cover retail drugstore customers—as to whom price discrimination was found—and not other types of customers (*e.g.,* wholesalers, indus-

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that Borden had, in fact, beaten the competitive offer yet did not communicate this to Borden. If it had, Borden might very well have withdrawn its bid." (A1065). But this "non-disclosure"—not informing Borden that Borden "beat" Bowman's bid and that the meeting competition defense was unavailable—was specifically found to be proper by the Commission in its dismissal of Count I of the complaint. As it stated: "We do not believe that the failure of buyers to engage in such disclosure should violate the FTC Act." (A1028).

[74] On the contrary, Schmidt testified that he never informed anyone at A&P that Borden had mentioned meeting competition in connection with its private label proposal (A1907-08, 1913-14). Furthermore, no Borden representative ever mentioned meeting competition or any other limitation in their discussions with Bartels in Chicago or Smith in New York (A1090, 1792-93, 1797, 2024, 2192-93, 3381-83, 4460).

trial and other customers). *William H. Rorer, Inc.* v. *FTC*, 374 F.2d 622 (2d Cir. 1967).

The Commission notes that A&P's private label program was the "result of a nationwide program . . . initiated and supervised by A&P's New York dairy headquarters" (A1067). The administrative law judge found, however, that the private label negotiations were "handled primarily at the Unit level" (p. 81, n.71 above). There is nothing illegal in a private label program as such, and there is no claim that any objectionable feature of the Chicago arrangement had any analog in any other part of the country. On the contrary, the fact that A&P undertook a nationwide program to install private label products without further incident shows that such a sweeping order is neither necessary or appropriate.

In sum, the Commission's order should be vacated for mootness and lack of evidentiary support, and should in any event be modified to limit its applicability to the Chicago area and to delete the provision giving A&P the burden of proof of the meeting competition defense.

CONCLUSION

For the reasons demonstrated above, the decision appealed from should be reversed and Count II of the complaint should be dismissed. Alternatively, the Commission's order should be vacated or modified as indicated.

Dated: New York, New York
November 15, 1976

Respectfully submitted,

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STATUTORY APPENDIX

Statutory Appendix

1. Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a), provides in pertinent part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . ."

2. Section 2(b) of the Clayton Act, as amended, 15 U.S.C. § 13(b), provides:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is

authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

3. Section 2(f) of the Clayton Act, as amended, 15 U.S.C. § 13(f), provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

4. Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, provides in pertinent part:

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. . . ."

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